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THE DISTRIBUTION OF THE BINDING PORTION OF THE CONSIDERATION FOR A TRANSFER OF JOINT FAMILY PROPERTY BY THE MANAGER, *i.e.*, WHEN THE TRANSFER IS SET ASIDE IN PART.

Three views are possible as to the mode of distribution. Of them, two are extremes; and the third view is the golden mean.

The view most favourable to the alienee is that the non-binding portion of the consideration should be wholly ascribed to the alienor's share, and the binding portion should be wholly ascribed to the challenging coparcener's share. Some analogy thereto may be found in section 60 of the Contract Act (regarding appropriation).

The view most in favour of the challenging coparcener is the precise reverse of the view most favourable to the alienee. The challenging coparcener's interest is to maintain that the non-binding portion of the consideration should be wholly ascribed to his own share, and that the binding portion should be wholly ascribed to the alienor's share, so that he (the challenger) might altogether escape payment of his share of the family burdens.

The third view which is the happy mean between the two opposite extremes noticed above, is this: The valid portion of the consideration as well as the invalid portion must be distributed over the shares of each and every one of the coparceners including the alienor. This was laid down in *Vadivelam Pillai* v. *Natesam Pillai*[1], and has been acted upon in *Seetharam Naidu* v. *Balakrishna Naidu*[2], *Muthukrishna Naidu* v. *Muthu*

1 (1912) I.L.R. 37 M. 435 at 437· 23 M.L.J. 256.
2 (1913) 26 M.L.J. 604 at 611.

krishnappa Naidu[3] and *Adinarayana Reddi* v. *Subbarayal Reddi*[4]; and it may be assimilated to the equitable principles embodied in the Transfer of Property Act, sections 82, 37, 45, 46 and 47 and the Contract Act, section 61, clause (2). But for the decisions in *Marappa Gaundan* v. *Rangaswami Gaundan*[5] and *Venkatapathi Nayakar* v. *Pappia Nayakar*[6], which sound a different note, further discussion would be unnecessary, and the matter would be *stare decisis*. No differentiation can be made for the present purpose between sales and mortgages except in one respect.

If the purchaser has acted in good faith and after due enquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of the surplus, and is, therefore, not bound to make repayment of such surplus to the coparcener challenging the sale (*Sri Krishn Das* v. *Nathu Ram*[7] and *Ram Sunder Lal* v. *Lachmi Narain*[8].) It is not always possible for the manager to sell just that fraction of the property which will bring in the precise sum required to clear the binding debts. But unlike sales, mortgages can more easily be arranged for any required sum, though of course the manager has a fair discretionary power to decide if the required sum should be raised by mortgage or by sale: *Niamat Rai* v. *Din Dayal.*[9]

Where the purchaser (*Z*) fails to prove that the sale as a whole was justified by legal necessity, the sale cannot bind the share of the challenging coparcener (*Y*) and the question would arise how the binding portion of the consideration is to be distributed over his share and that of the alienor (*X*). Let us take it for the purpose of an illustration that Rs. 1,000 was the fair price of the property and was actually paid by *Z* to *X*, but only Rs. 500 thereof was for a binding purpose. *Vadivelam Pillai* v. *Natesam Pillai*[1] is clear authority for the proposition that not only is the sale of *X's* share to be upheld, but *Y's* share also is to be burdened with a charge for Rs. 250.

If the assets of the family were worth Rs. 1,000 and the liabilities of the family amounted to Rs. 500 *Y* would on

1. (1912) I.L.R. 37 M 435 at 437: 23 M.L.J. 256.
3. (1917) M.W.N. 273.
4 A.I.R. 1927 M. 1116 at 1117.
5. (1899) I.L.R. 23 M 89
6 (1928) I.L.R. 51 M. 824 · 55 M.L.J. 489
7. (1926) L.R. 54 I.A. 79 · I L R 49 A. 149. 52 M.L.J. 720 (P.C.).
8. (1929) I L.R. 51 A. 430 · 57 M.L.J. 7 (P.C.).
9. (1927) L.R. 54 I A. 211: I.L.R. 8 Lah. 597: 52 M.L.J. 729 (P.C.).

partition get for his share Rs. 500 worth of property; but he would have to pay Rs. 250 of the family debts. How far is that situation affected by the sale to *Z*? At a suit for partition by *Y*, *X* and *Z* would be the defendants. If the Court should find that the sale was on the whole justifiable, though only Rs. 500 of the consideration represented debts binding upon the family, *Y* cannot recover any share of the property; but he may be entitled to recover Rs. 250 out of the surplus Rs. 500 that *X* improperly applied to his personal use. (*Arumilli Terrazu* v. *Arumilli Subbarayudu*.[10]) On the other hand, if the Court should find that the sale is good only to the extent of *X's* half share, *X* would be liable to *Z* for the consequential damages to the extent of Rs. 500. (*Adikesavan Naidu* v. *Gurunatha Chetti*.[11])

And is *Y* to get his half share of the property free from all liability to contribute his own share of the family debts, to *X* or to *Z* who stands in *X's* shoes? Surely, the intervention of the sale to *Z* cannot and ought not to put *Y* in a better position than what he would have occupied, but for that sale; in other words, *Y* can have property worth only Rs. 250 ***nett***, and must bear Rs. 250 of the family debts. That is the point of decision in *Vadivelam Pillai* v. *Natesam Pillai*.[1]

I have so far assumed that the sale by *X* to *Z* was a real transaction, and that the consideration therefor was not manifestly inadequate. If in spite of the apparent recitals of consideration, the transaction should be a gift or a sham, *Y* would be at liberty to recover from *Z* the entire property including *X's* share; for, by the law of this Province, a coparcener can sell his share for value, but cannot make a gift of it: *Rottala Ranganatham Chetty* v. *Pulicat Ramaswami Chetty*[12] and *Krishna Reddi* v. *Raghava Reddi*[13].

If the sale by *X* to *Z* was supported by consideration to the extent of, say, Rs. 100, and the rest of the consideration was nominal or fictitious, the transaction would be substantially a gift; and the proper course would be to declare that the sale was void, and to give *Z* a charge on the property for the Rs. 100. If the Rs. 100 should represent a binding family purpose, *Y's* share also would be liable therefor; otherwise, only *X's* share would be liable; but the distinction may not be of much practi-

1 (1912) I.L.R. 37 M 435 at 437 · 23 M.L.J. 256
10 (1921) L R 48 I A 280. I L R 44 M 656 at 663 · 41 M L J 33 (P C).
11. (1916) I.L.R. 40 M 338: 32 M L J. 180 (F.B.)
12 (1903) I.L.R 27 M. 162
13. (1927) 53 M L.J. 700 (P.C.)

cal consequence from the point of view of *Z*, as *X's* share by itself would be ample security for the Rs. 100. (*Rottala Ranganatham Chetty* v. *Pulicat Ramaswami Chetty*.[12])

Next, I turn to the case in *Venkatapathi Nayakar* v. *Pappia Nayakar*[6], which purports to dissent from *Vadivelam Pillai* v. *Natesam Pillai*[1] and the cases following it. The facts were these: At the time of the disputed sale, the alienating coparcener Subba Naick had only a fourth share. The plaintiff who challenged the sale was his son; and Subba Naick's father too (*i.e.*, plaintiff's grandfather) was alive at the date of the sale. Subsequent to the sale, but before suit, plaintiff's father and grandfather were dead. Subba Naick purported to sell the entirety of certain property for Rs 600; but the consideration proved amounted only to Rs. 400. The Courts found that the property was really worth Rs. 2,000.

The first Appellate Court assumed that plaintiff and Subba Naick had each a half share in the property; and it held that the sale was not binding on plaintiff's share to any extent. The plaintiff filed a second appeal to the High Court; and his contention in second appeal was that the whole sale must be set aside on condition of his paying to the vendee Rs. 400, which he was willing to do.

For the alienee-respondent, it was conceded in second appeal, that Subba Naick's share was only one-fourth; and the only question was, if the alienee was to be deprived of even that one-fourth share, subject to the reimbursement of Rs. 400. Subbiah Naick's one-fourth share was worth Rs. 500; and the sale was supported by consideration to the extent of Rs. 400 only. In those circumstances, the High Court took the view that the proved consideration was not grossly inadequate, and that it can be regarded as the price of the alienor's share, though it was less than the value of such share; accordingly, the High Court upheld the transaction as a sale of the father's share only, *i.e.*, one-fourth of the property. Thus, the alienee suffered no real prejudice by reason of the decree of the High Court, which secured to him his full money's worth and a quarter more.

Next, I turn to consider the facts in *Vadivelam Pillai* v. *Natesam Pillai*.[1] One Chinnappa, the managing member of a family consisting of himself and his nephew, sold certain

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1 (1912) I.L.R 37 M 435 at 437 23 M.L J. 256
6 (1928) I L.R. 51 M 824 55 M.L.J. 489.
12 (1903) I.L.R. 27 M 162

family property for Rs. 500; of that sum, Rs. 250 alone was found to be binding on the family, and the remaining Rs. 250 was not binding on the plaintiff-nephew. The sale was presumably for a fair price as there was no suggestion to the contrary. In those circumstances, the High Court decreed to the plaintiff a half share in the property sold by his uncle, on condition that plaintiff should pay Rs. 125 to the alienee. Such a conditional decree is sanctioned by the decisions of the Privy Council in the analogous cases of *Ram Charan Lonia v. Bhagwan Das Maheshri*[15], *Banwari Lal v. Mahesh*[16] and *Skinner v. Naunihal Singh*[17].

The principle of the decision is thus stated at page 437:

"According to accepted equitable principles, in the absence of anything appearing to the contrary, the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part. On this principle the whole of the Rs 500 must be distributed over the shares belonging to the plaintiff and Chinnappa respectively. There is no ground for supposing that one portion of the consideration was allocated to a particular half share and the other portion to the other half share. The valid portion of the consideration as well as the invalid portion must be distributed over each of the half shares of the plaintiff and Chinnappa respectively The result would be that the plaintiff would be bound to pay one-half of the Rs. 250 held binding on the family, that is Rs 125, before he can recover possession of the half share claimed by him."

From the above analysis of the cases *Vadivelam Pillai v. Natesam Pillai*[1] and *Venkatapathi Nayakar v. Pappia Nayakar*[6], it appears that the two decisions can well stand together; for, each case must be taken to decide no more than what was necessary for the judgment. On the facts, the crucial distinction between the two cases is this: In *Vadivelam Pillai v. Natesam Pillai*[1] the alienee paid fair price for the property purchased by him, though only one-half of it represented family necessity; on the other hand, in *Venkatapathi Nayakar v. Pappia Nayakar*[6], the price paid by the alienee was even less than the value of the alienor's one-fourth share.

True, *Vadivelam Pillai v. Natesam Pillai*[1] itself dissents from the reasoning in *Marappa Goundan v. Rangaswami Goundan*.[5] But in *Marappa Goundan v. Rangaswami Goundan*[5] the first Appellate Court found that the second item of the con-

1 (1912) I.L.R. 37 M 435 at 437: 23 M.L.J. 256
5 (1899) I.L.R. 23 M 89
6 (1928) I.L.R. 51 M 824 55 M.L.J. 489
15. (1926) L.R. 53 I.A. 142: I.L.R. 48 A 443 at 456 (P C.)
16 (1918) L.R. 45 I A 284: I.L R. 41 A. 63 at 68 (P.C.).
17. (1913) L R. 40 I.A. 105: I L R. 35 A 211 at 216. 25 M.L.J. 111 (P.C).

sideration for the sale there in question was neither "real nor *bona fide*"; and nothing is known as to the value of the property or of the alienor's share therein. For aught one can guess, the facts in *Marappa Gaundan* v. *Rangaswami Gaundan*[5] were probably on all fours with the facts in *Venkatapathi Nayakar* v. *Pappia Nayakar*[6].

The broad proposition enunciated in *Marappa Gaundan* v. *Rangaswami Gaundan*[5] is this:

> "The alienee is only entitled to the share of his alienor, and has no further claim on the shares of the other coparceners in respect of the sum for which the alienation was rightly made"

In the estimation of Sir John Wallis, that proposition does not rest on any sound principle (*Seetharam Naidu* v. *Balakrish Naidu*[2]); and it has not commended itself to the bulk of judicial and professional opinion. But the rule in *Vadivelam Pillai's case*[1] is in popular vogue because of its even-handedness:—equity is equality.

K. C. G.

SUMMARY OF ENGLISH CASES.

In re CITY EQUITABLE FIRE INSURANCE COMPANY, LTD., (1930) 2 Ch. 293.

Bankruptcy Act, S. 31—*Insurance Company—Deposit for securing due performance of reinsurer's obligations—Winding up of reinsurer company—Surplus after satisfying obligations—Other sums due to the insurer—If insurer entitled to set off—Interest on deposit.*

By a treaty of reinsurance between *G* insurance company and *C* insurance company (Reinsurer), *C* accepted and guaranteed by way of reinsurance a share of all insurances and reinsurances accepted or renewed by *G* in its fire department. The treaty provided that *G* shall be entitled to accumulate out of any moneys due to the reinsurer a sum equal to 40 per cent. of all premiums credited to the reinsurer in respect of the first 12 months of this agreement and this sum *was to remain in G's hands as security for the due performance of C's obligations under the agreement.* When any default was made by *C*, *G* was entitled to take the requisite sum out of this deposit. *G*

1. (1912) I.L.R. 37 M. 435 at 437: 23 M.L.J. 256
2 (1913) 26 M.L.J 604 at 611.
5. (1899) I.L.R. 23 M 89.
6 (1928) I.L.R. 51 M 824: 55 M.L.J. 489,

was to pay interest to C at 3½ per cent. on the remaining deposit. If at any time C should go into liquidation, G had the right to terminate the agreement forthwith by notice. On February 14, 1922, a compulsory winding-up order was made against C on a petition presented in January and G thereupon determined the agreement by notice. After all obligations under the treaty had been satisfied, there remained with G a balance of 8000*l.* in deposit and a sum of about 1800*l.* representing interest accrued on the deposit. G claimed to be entitled to set off balances due from C under other treaties, contracts and policies of insurance and reinsurance against the balance of the deposit and the interest.

Held, by Maugham, J., that the moneys which G was entitled to retain and accumulate must be taken to be moneys left with G *for a specific purpose* and that, therefore, G was bound to pay over the balance of the deposit and interest.

Held, by the Court of Appeal:—That the Article in the treaty makes a distinction between the portion of the premiums which G was entitled to retain as a deposit and the interest upon that sum which remains to the credit of C. The interest is clearly and definitely directed to be paid "to the reinsurer". It is not to be credited in account or added to the accumulating fund. It represents, therefore, a debt due from G to C and hence falls within S. 31 of the Bankruptcy Act as being a mutual credit or debit arising by reason of the relationship and ought to be brought into account.

But as to the accumulated fund, they were moneys collected and held by G as security and is set apart from the ordinary current accounts between G and C, and, therefore, in the absence of any new contract which freed the fund from the definite purpose of being security for due performance of C's obligations under the agreement, there can be no set off in respect of the balance of the fund not required for the purpose for which it was accumulated in the hands of G.

ATTORNEY-GENERAL *v.* PRICES' TAILORS (1928) LIMITED, (1930) 2 Ch. 316.

Local Government—Public Health Act, 1875, *S.* 155—*'Front' of a house—Meaning of.*

The defendant firm purchased two shops, each shop consisting of a building of three stories. The ground floor of each shop projected a distance of 4 ft. 3 in. beyond the line of the exterior wall of the first and second floors. The defendants

proposed to cut away the main wall between the two shops and convert both into one shop with an entrance from the street. The Borough Corporation disapproved the plan and desired the setting back of the building line in a line with the first and second floor's main wall. The defendants disputed the right of the Borough to prescribe a new building line, as they contended that they did not take down the 'front' of the building within the meaning of S. 155 of the Public Health Act.

Held, by Luxmoore, J.—*Prima facie* a house or building consists of all its floors and the exterior walls of the first and second floors are in the present case as much part of the front of the house as the exterior wall of the ground floor projection. A house might possibly be considered to be taken down, if only a few bricks were left standing. But, when a substantial portion, such as the whole top floor, is left untouched, the house cannot be said to be taken down. The defendant never intended to take down his front but only to take out part of it, leaving a substantial portion untouched.

Held, by the Court of Appeal.—The right of the urban authority to prescribe a building line under S. 155 arises only when the house or the building or the front has been taken down. 'Taken down' does not mean merely remodelled, it means 'removed' and the question for the Court is whether there has been a demolition of so large a portion of the house or the front of it as to justify it in holding that the house or the front of it has been taken down.

In re ROBINSON. LAMB *v.* ROBINSON, (1930) 2 Ch. 332.

Will—Revocation—Gift of an annuity to A *by will—Later will gifting an absolute interest in favour of the same* A*—Later will invalid, as being attested by* A's *wife—Whether revokes the earlier will.*

A testatrix bequeathed in 1914 her residuary estate unto her trustee upon trust to pay an annuity therefrom to *A*. In 1921 she executed another will which she called as "her last will and testament" and gave the whole estate to *A*. But the will was found to be invalid as it was attested by his (*A's*) wife.

Held, that the first will was not revoked. On the recent authorities, the test is not the inconsistency of a gift in the later will as held in *Baker* v. *Story*, 31 L.T. 631, but one of the intention of the testator to revoke the earlier will. If the testator had made two distinct gifts to a person by two instru-

ments, it must be ascertained from the language of the two instruments whether the first gift has been altogether displaced. If there is a clear intention to revoke the earlier instrument, the failure of the second gift will not restore the first one.

In re WATSON. CULME-SEYMOUR *v.* BRAND, (1930) 2 Ch. 344.

Will—Construction—'Born in my lifetime or within due time after my death'—Meaning of.

By his will the testator declared that if a son should be born to *W.W.* or *M.C.S.* (both successive tenants for life in remainder) during his lifetime or 'within due time' after his death, then the estate in tail male which he had previously devised to each such son shall not take effect but in lieu thereof he (the son) shall take as tenant for life. The testator died in 1899 and the plaintiff, a son of *M.C.S.* was born in 1909. On the death of *W.W.* the tenant for life under the will, the plaintiff came into possession (his father having died during *W.W.'s* life-time) and executed a disentailing deed.

Held, 'within due time' meant only the period of gestation and not the perpetuity rule period of 21 years and, therefore, the disentailing deed was operative, and the shifting clause reducing the estate to one for life did not apply. The Court will choose a construction which gives an intelligible, if whimsical meaning to the words, to one which would not only avoid the limitation but would really give no clue to what the testator meant by 'due time.'

In re CASTNER-KELLNER ALKALI COMPANY, LIMITED, (1930) 2 Ch. 349.

Company—Amalgamation with another company—Approval of the scheme and the terms of amalgamation by more than 90 per cent. of the transferor company—The transferee company amalgamated later with another company—Dissentient shareholders of first company if bound to accept scheme—S. 155, *Companies Act,* 1929.

Two companies, *C* (transferor) and *B* (transferee), were to be amalgamated on certain terms which over 90 per cent. of *C's* shareholders agreed to but there were a few dissentient shareholders. In 1926 a further amalgamation took place of *B* with Imperial Chemical Industries, Ltd., by which *B* was to be acquired by that company on certain terms. A petition was

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filed by *B* under S. 155 of the Companies Act against the dissentients of *C* to accept a rate which the last transferee company offered to *C's* approving shareholders and to issue a notice to them that it desired to acquire their shares on those terms. It was contended that *B* having in turn been acquired by the Imperial Chemicals, *B* could no longer give effect to its terms and S. 155 cannot be invoked, as in effect it is a new scheme which is now imposed on them and not the one at the time of amalgamation of *C* with *B*.

Held, by Eve, J., that the application was within the section. There is nothing in the section to control the nature of the offer the applicants may put forward. It is for the Court to consider and decide whether it is an adequate and satisfactory one, and, if not, to substitute such other terms of purchase as in its discretion are fair and just.

MARCONI'S WIRELESS TELEGRAPH CO v. NEWMAN, (1930) 2 K.B. 292.

Bankruptcy—Deed of inspectorship—Inspector leaving the conduct of the business to the debtor—Inspector and committee of inspection how far personally liable to creditors—Partner ceasing to concern himself with the business—Effect of.

The plaintiffs were the owners of certain Letters Patent in respect of inventions relating to wireless apparatus and the defendants *N* and *B* were the holders by novation of a license from them to use and exercise the inventions subject to payment of a certain amount as royalty. *N* and *B* got into difficulties due to shortage of liquid capital and the creditors therefore appointed a committee of inspection to supervise the business. *N* and *B* duly executed a deed of inspectorship and *C* was appointed the inspector. The debtors *N* and *B* assigned all their estates to *C* as inspector upon trust to allow the debtors "henceforth to manage and carry on their said business" subject to the covenants and conditions of the deed. In a circular issued by *C*, he stated that "all orders for goods required for the purpose of carrying on the business will be issued on my official order forms in the usual way and will be paid for by me". The plaintiffs claimed from *N* and *B* as also *C* and the members of the committee personally the royalties that became payable after the deed of inspection was executed.

Held, that the deed of inspection was similar to the one in *Easterbrook* v. *Barker,* L.R. 6 C.P. 1, and upon the authority of that case the business remained the business of the

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debtors, who undertook to carry it on or to wind it up, as the inspector and committee should think best. Such a deed does not constitute a partnership between the debtors and their creditors or between them and the inspector and the committee. In view of the language of the deed in question, the debtors *N* and *B* do not become the agents of the inspector or of the committee to carry on the business. The true position was that the plaintiffs were content to allow the business of *N* and *B* to continue as before in the hope and expectation that after surmounting the crisis, which all believed to be but temporary, *N* and *B* would be able to pay such royalties as might be incurred by them through a continuance of their trading. The inspector and committee could not, therefore, be held liable for the royalties.

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As to the contention by *B* that he ceased to concern himself with the business, as he and *N* took different views as to how it should be conducted and he found himself powerless to secure the prevalence of his own view, and therefore ought not to be made liable,

Held, that he nevertheless remained a partner in the business and was therefore liable.

HOLMES *v.* PAYNE, (1930) 2 K.B. 301.

Insurance—Pearl necklace—Insurance against loss of—Necklace mislaid and believed to have been lost—Company agreeing to give articles of equal value—Subsequent discovery of necklace—If agreement to give can be rescinded—'Loss,' meaning of.

The defendant had insured with the plaintiffs her articles of jewellery including a pearl necklace. The policy provided that, in consideration of the premium mentioned therein, the underwriters agreed to insure against all loss which the assured may sustain by the loss or damage to the insured jewellery. The defendant missed the pearl necklace, searched for it in all conceivable places and wrote to the company that it was lost. At their instance, she further searched for it but without result. Then the underwriters entered into an agreement with her to replace the lost jewels of the value of the necklace and she selected the jewels also for a certain value and was in process of selecting further to exhaust the balance of the value of the necklace. By that time the missed necklace was found in an evening cloak. The underwriters then claimed a return of the replaced jewellery on the ground that the replacement agree-

ment was void as having been made under a common mistake of fact. The defendant counterclaimed for the balance.

Held, the replacement agreement cannot be rescinded or reopened. The defendant made a thorough search of the standard of a reasonably diligent woman for the necklace. The agent of the underwriters was not wholly induced by the defendant's representations—innocent and honest—but himself investigated and formed his own conclusions on all facts and not on what he was told by her. Though ordinarily an adjustment could be re-opened, the position is very different where a payment—either in money or in kind—has been made. (*Da Costa* v. *Firth*, 4 Burr. 1966.)

A thing can be lost even when it is in the owner's house. A thing may be mislaid and yet not lost. But if a thing has been mislaid and is missing or disappeared and a reasonable time has elapsed to allow of diligent search and of recovery and such diligent search has been made and has been fruitless, then the thing may properly be said to be lost. Uncertainty to recovery of the thing is the main consideration on the question of loss.

ROBERT A MUNRO & CO, LIMITED *v.* MEYER, (1930) 2 K.B. 312.

Contract—Sale of goods—Delivery by instalments—Each delivery to be treated as a separate contract—Goods to be taken with all faults and defects—Delivery of some instalments—Goods discovered to be adulterated and not of contract quality—Seller purchasing from another—Seller himself ignorant of the defect in the goods—Delay in discovery—Effect of, on the contract.

By a contract made between the plaintiffs—dealers in cattle foods at London and the defendant—merchant trading at Hamburg, for sale of 1,500 tons of meat and bone meat, it was provided that (*i*) the goods were to be of a certain specified quality, the composition of the production being specified, (*ii*) that it was to be shipped in equal weekly instalments of 125 tons, (*iii*) "each delivery or shipment to be treated as a separate contract and the failure to give or take any delivery or shipment shall not cancel the contract as to future deliveries or shipments, and (*iv*) "the goods to be taken with all faults and defects; damaged or inferior, if any, at valuation to be arranged mutually or by arbitration." The plaintiffs made certain deliveries which the defendants accepted without demur.

Subsequently the defendant being in financial difficulties entered into another agreement to pay some amount for cancelling the balance of the contract and reducing the quantity to be supplied. After some deliveries were completed, the defendants discovered that the meal had been adulterated by an admixture of cocoa husks and refused to make any further payments. They also found that the previous deliveries were bad. The plaintiffs were blameless and knew nothing of it, the adulteration having been made by the manufacturers of the meal, from whom the plaintiffs purchased it.

Held, that the article delivered did not answer the contract description and might have been rejected, notwithstanding the clause that 'the goods to be taken with all faults. . .' That clause only applies where the goods answer the trade description and does not shut out the implied warranty under S. 13 of the Sale of Goods Act; that though the seller was unaware of the facts and could not have had an intention to break the contract, yet as there was a persistent breach, deliberate so far as his manufacturers were concerned, continuing for nearly one-half of the total quantity, the buyer is entitled to say that he will not take any further deliveries and that the contract was repudiated. The intention of the seller must be judged from his acts and from the deliveries which he in fact makes. But the contract cannot be set aside as it is not clear that even if the defendant had known the defective deliveries, he would have elected to treat the contract as at an end and further it will not now be possible to restore the parties to their original position. The provision in the contract that each delivery shall be treated as a separate contract cannot be construed so as to defeat the rights of the buyer under section 31 of the Sale of Goods Act, 1893. The buyer was anyhow entitled to damages in respect of the defective quality of the meal supplied and cannot be compelled to take any more deliveries.

KODAK, LIMITED *v.* ALPHA FILM CORPORATION, LIMITED, (1930) 2 K.B. 340.

Practice—Procedure—Summons for leave to sign judgment—Refusal of—Defendant—Conditional leave to defend—If Court can impose conditions to defending.

The Court refused leave to sign final judgment under O. 14 of the Rules of the Supreme Court in an action for a specific claim as due for goods sold and delivered to the defendant. But it nevertheless imposed conditions on the defendant before

entering on his defence, like that the case should be entered in the short cause list for trial by a Judge alone without a jury.

Held, by the Court of Appeal (Scrutton, L.J., dissenting) that where the Court is not prepared to give leave to the plaintiff to sign judgment, it cannot impose conditions on the defendant. But if the Judge is inclined to grant leave to sign judgment, he may impose conditions on the defendant before permitting him to defend.

FISHER *v.* OLDHAM CORPORATION, (1930) 2 K.B. 364.

False imprisonment—Borough Corporation—Watch Committee Police—Arrest of plaintiff by mistake—Corporation if liable for the Borough Police's arrest.

Information was laid for the arrest of one *R* and a warrant issued under the hand of a Justice of the Peace for the Borough of Oldham for his arrest. The Oldham Police communicated with the London Police as *R* was suspected to have run away to London. The London Police arrested the plaintiff mistaking him to be *R*, handed him over to Oldham Police, who detained him for several hours, till the mistake was discovered. In an action for false imprisonment against the Corporation,

Held, that the Oldham Police Officer was not a servant of the Oldham Corporation. Any appointment by the Watch Committee of a constable was subject to the controlling regulations of the Home Secretary, and the powers of suspension are shared with the local magistrate and controlled and limited by other statutory provisions. The constable is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation. The Corporation cannot, therefore, be held liable if the police appointed by the Watch Committee arrest and detain a person unlawfully.

Lambert v. *Great Eastern Railway Company,* (1909) 2 K.B. 776; *Goff* v. *Great Northern Railway Company,* (1861) 3 E. & E. 672 and *Edwards* v. *Midland Railway Co.,* (1880) 6 Q.B.D. 287, distinguished.

Stanbury v. *Exeter Corporation,* (1905) 2 K.B. 842 and *Coomber* v. *Justices of Berks,* (1883) 9 A.C. 61, followed.

Case-law discussed.

GOTTLIFFE *v.* EDELSTON, (1930) 2 K.B. 378.

Husband and wife—Accident to plaintiff by defendant's negligent motor driving—Action for damages—Marriage of the parties pending action—Effect of, on the action.

The plaintiff brought an action against the defendant claiming damages for personal injuries caused by the defendant's negligent driving of a motor car, in which car the plaintiff was a passenger. Pending the suit, the plaintiff and the defendant married and the question arose if the action can any further continue. The question had to be argued as the real defendant in the action was the insurance company with which the defendant was insured.

Held, that though under S. 12 of the Married Women's Property Act the wife is given full power to guard her separate property, she cannot sue her husband for any tort whether before or during marriage. This action is not an action for the protection and security of the wife's separate property and therefore the action is barred by the prohibitory words in S. 12 "Except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

The anomalies in the law of husband and wife as at present obtaining pointed out and legislation suggested.

KITCAT *v.* KING, (1930) P. 266.

Will—Codicil—Codicil stating 'This is the last will and testament'—Effect of—Codicil attested by four witnesses, two of them beneficiaries—The beneficiaries not signing with intention to attest—Both will and codicil admitted to probate, beneficiaries' signatures being omitted.

A testatrix executed a will in 1906 and a codicil in 1929 but the codicil stated that "this is the last will and testament of *A.B.*" and was attested by four persons, two of whom were beneficiaries under it. It was found that the two beneficiaries did not intend to sign as attesting witnesses but as one of them stated 'only to make it legal' by expressing their assent to the testatrix so dealing with the property.

Held, that the later will was a codicil which can be read with the first will (*Simpson* v *Foxon,* (1907) P. 54, followed). Probate can be granted of both the will and the codicil omitting the signatures of the beneficiaries under the codicil, as the beneficiaries only signed by way of verification and not as attesting witnesses.

E. J. Smith, In the Goods of, (1889) 15 P.D. 2, followed.

JOTTINGS AND CUTTINGS.

Lord Cecil and the League of Nations.—On some matters of public interest and importance, party rivalries happily disappear. Such is the project which, according to a letter to *The Times* of October 25, has been initiated to pay a tribute to Viscount Cecil of Chelwood for his "unique services to the cause of international co-operation and goodwill." The letter is fittingly signed by Mr. Ramsay MacDonald, Mr. Baldwin, and Mr. Lloyd George. It recalls that the formation and maintenance of the League of Nations are due to the labours of many distinguished men, and many nationalities, but "it has fallen to Lord Cecil to devote himself single-mindedly to strengthening the League and promoting the intelligent understanding of its work among all classes of his fellow-citizens." The proposal is to present Lord Cecil with his portrait, in the hope that it will eventually become a public possession in the National Portrait Gallery, and a Committee has been formed for this purpose.—*L.J.*, 1930, p. 256.

Lord Parker's Scheme.—The services of Lord Cecil ever since the League of Nations was established are well known, and not least his efforts at the recent Assembly of the League of Nations to help on, and in the face of somewhat difficult opposition, the cause of Disarmament. Lord Cecil, as the letter says, has not been alone in his endeavour, and others in France and America, and in this country are well known to have been co-workers with him. But premature death silenced the voice of one of the earliest advocates of a League of Nations, who, had he lived, would have been as zealous in the same cause. We refer to Lord Parker of Waddington. In March, 1918, when the subject was not altogether easy of discussion, Lord Parmoor moved in the House of Lords, "That this House approves of the principle of a League of Nations, and the constitution of a tribunal whose orders shall be enforceable by an adequate sanction." On that occasion Lord Parker stated in detail a scheme for a League which he had prepared. In a letter to *The Times* of March 2, 1918, Sir Frederick Pollock described his speech as by far the most practical contribution towards the formation of an effective League of Peace which had then been made in this country. The work has had to be carried on by others, of whom Lord Cecil has been the chief, and the joint letter of the leaders of the three political parties shows how his work for the League of Nations is appreciated.—*L.J.*, 1930, p. 256.

Cheaper and Simpler Litigation.—A topic which is not concerned with a matter of either Imperial or political interest, and which receives the distinction of being dealt with in a first leading article in *The Times*, may be taken to be one of considerable importance, and the fact that the publication in last Saturday's *Times* of a letter from Mr. Heber Hart, K.C., suggesting certain reforms in our legal procedure, was made the occasion of such a leading article is an indication of the undoubted fact that public opinion is aroused upon the matter. Mr. Heber Hart was the British representative on the Mixed Arbitral Tribunals set up under the Treaties of Peace between Great Britain and Germany and Austria, which have recently concluded their labours, and he has therefore peculiar qualifications for making suggestions as to reforms of procedure; for the Tribunals of which he was a member had to frame and administer their own system of procedure, and to do this in such a way as to satisfy both British and Continental ideas of what was necessary in order to ensure the proper administration of justice. Mr. Hart makes some definite suggestions for the reform of procedure in civil cases—the right to a trial before three judges, and the withdrawal of the right to trial by jury; one appeal only; a preliminary hearing before a Master after the close of the pleading; the fixing of dates for trial in every case; the abrogation of the greater part of the law of evidence; party and party costs to be considerably limited; and the development of a convention that counsel should abandon, or present without advocacy, a case which he feels to be untenable in fact or in law. Every one of these suggestions deserves careful consideration, although some of them will, we think, hardly command the assent of the profession; it is obvious that they cannot here be dealt with as they deserve, and we hope to consider them in another column in the near future.—*L.J.*, 1930, p. 290.

Judge-Made Laws.—Another question, which has more than incidental relevance to the question of the cost of litigation, is raised by Mr. Claud Mullins in a letter in *The Times* of November 11. Mr. Mullins himself recently urged, in an article in the July *Quarterly Review*, to which we referred at the time (*ante*, p. 102), that the practically unrestricted right to a jury and the rigid application of elaborate rules of evidence were among the principal causes of the excessive cost of litigation in this country. In Tuesday's letter he takes new ground by pointing out that our system, by which the reported judg-

ments of decisions in the Superior Courts are binding authorities on all Courts of co-ordinate or inferior jurisdiction, and the fact that such judgments can only be questioned by appeal, is responsible for a considerable part of the cost of litigation. This contention is not to be denied; it is no uncommon thing for a proposing litigant to be advised that the point he desires to litigate is covered by authority, so that he cannot succeed at the first hearing, but that if he cares to go as far as the Court of Appeal—or if the authority in question is a decision of the Court of Appeal, as far as the House of Lords—he has a good prospect of success. And in order to get the law determined he cannot appeal from the reported authority, but must take his own case through the appropriate Court of first instance and any Appellate Courts which have already dealt with the point, in order to have it considered by a Court with authority to deal with it. In such circumstances there are few individuals who are prepared to undertake the necessary financial responsibility, and the result is that many cases remain as authorities on points which might well receive further judicial consideration. A reasonably satisfactory method of dealing with this problem should not be difficult to evolve, and we have our own views on the subject which we may presently propound; but before doing so we shall await with interest Mr. Mullins' promised book, in which we gather he deals fully with the whole matter.—*L.J.*, 1930, p. 290.

Sir Dinshah Mulla.—A correspondent writes: The recent appointment of Sir Dinshah Mulla, C.I.E., to the Judicial Committee of the Privy Council, will be warmly welcomed in legal circles in India, and should prove of great benefit to the litigating public. Sir Dinshah brings to the Board a wide and ripe experience. Starting his career as a solicitor, Sir Dinshah afterwards became an advocate of the Bombay High Court, under special rules not requiring a previous call to the English Bar. He has since built up a very large practice at the Bombay Bar, and is now one of the best-known lawyers in India. He has the special gift of being able to extract the guiding principles of any particular branch of law, and to select only the best authorities for citation in support of such principles. This is well exemplified in his numerous text books, which are widely used throughout India. His versatility is shown by the diversity of the subjects on which he has written, either singly or in collaboration with others, *e.g.*, Hindu Law, Mahomedan Law, Civil Procedure Code, Registration Act, Stamp Act, and Con-

tract Act. He has also filled many high offices from time to time, having acted as Law Member on the Viceroy's Executive Council, as High Court Judge and as Advocate-General, Bombay, and has also been Principal of the Government Law College, Bombay. Recently, he has done particularly good public service by his work on the Government of India's Committees for re-drafting the Sale of Goods sections in the Contract Act, and portions of the Transfer of Property Act. In the result, the Amending Bills passed through the Indian Legislature with practically universal approval. It is of interest to note that Sir Dinshah is the first Parsi, the first non-barrister Indian advocate, and the first Indian ex-solicitor to sit on the Judicial Committee.—*L.J.*, 1930, p. 291.

Justices, Husbands and Wives.—Caustic judicial comment on the strange manner in which Justices grant separation orders was recently quoted in this column. I observe that "C.L.H.," whose pungent style suggests the same authorship as that of the article on "Justices' Justice," which evoked a flood of comment and correspondence in the *Week-End Review*, has contributed an article to *The Nation* on the ways of Magistrates in making separation and maintenance orders. He is clearly of opinion that the Magistrates' mode is worse than a crime. Magistrates, including the women Magistrates, so often drawn from the class of "Social Workers," are nearly always for the women: and they will break up the state of matrimony with appalling freedom, frequency and speed. Orders for maintenance are often made without any due regard to the means of the husband. He may be unemployed and his wife employed or in comparative affluence; but while he is in arrears he cannot obtain a variation of the order, and may be committed to gaol for failure to pay money which he never had. His theoretical right of appeal to the Divisional Court is in practice impossible to exercise.

I think that "C.L.H.'s" suggested remedy is sound, namely, that this vastly important and most difficult jurisdiction should be transferred to a tribunal which has knowledge of evidence and of the law; namely, to the County Court Judges. The Justices certainly are not equal to the task which has been thrust upon them.—*L.J.*, 1930, p. 300.

Swift, J., on Domestic Unity.—There is no manner of legal doubt that in the trial of a charge of assault by a husband

on his wife, the wife is a competent witness, as she is often the only one. The Court of Criminal Appeal has now gone a step further, aparently a necessary step, and, upholding a ruling of the Assize Judge, has stated that she is a compellable witness. This appears to be inevitable, but if, as usually occurs in such cases, her sympathy and love for her husband revive in his hour of trial, she will continue to be an eminently unsatisfactory witness for the prosecution. Douglas Jenkins, for the prisoner, did his best against the ruling of the judge of Assize; he cited a strong saying of Lord Atkinson in support of his contention, and went on to add that a rule compelling a wife to give evidence against her husband would tend to break up the unity of the home. This observation led Swift, J., into too great a temptation. "Assaulting a wife," said he, "is calculated to break up her unity," and further spake: "It might make for unity if she is able to say to her husband afterwards, 'I did not want to, but they made me.'" Perhaps.—*L.J.*, 1930, p. 301.

Case-Law and Economics.—How far is it permissible for Judges to be influenced in their decisions by economic theories? That, substantially, was the question dealt with on Fiday of last week by Prof. W. Hughes Parry in his lecture (*see* p. 343, *post*) at the London School of Economics on "Economic Theories in English Case Law," and by the Lord Chancellor in his opening remarks. In Lord Sankey's view, the more politics can be kept out of law the better; he would have them kept in water-tight compartments, and he referred in feeling terms to the trouble he has had in the last six weeks in attempting to put abstract theories of politicians into the shape of practical legal concepts. In other words, "equality of status" for the constituent members of the British Commonwealth of Nations is easier as a political slogan than as a working principle of Constitutional Law. Very likely that is so, but as regards economic theories, it may be impossible to sever them from law, and Prof. Parry gave numerous instances in which Judges have been guided in the past by either their own, or the prevailing theories as to trade and employment. The Common Law is based on the freedom of the individual, and this is strikingly shown in the doctrine of Restraint of Trade. All restraints of trade of themselves, said Lord Macnaghten in the *Nordenfelt Case*, (1894, A.C. 535), if there is nothing more, are contrary to public policy, and therefore void. This, with the doctrines of freedom of contract and *laissez faire*, has been

the prevailing characteristic of judge-made law; but in Prof. Parry's view, it is out of date, and the latest theories require that the law on which lawyers have been brought up should be corrected by social philosophy and by legislation. No doubt that is the tendency of the times, but at the risk of being also condemned as out of date, we may express the hope that the change from the Common Law as expounded by the Judges, to the socialisation with which we are threatened will not be too rapid.—*L.J.*, 1930, p. 326.

Slessor, L.J., and the Junior.—It is no secret that the appointment of Slesser, L.J., direct from the Bar to the Court of Appeal was regarded with some misgiving by some of the old hands in a Court which has suffered some serious reverses, but on the whole is justly proud of its judicial prestige. But Slesser, L.J., has indubitably made good, and removed by his performances all just cause for apprehension. He has demonstrated that he is not a judge of the mere concurring kind, and when he is with the majority he states his reasons in clear and lucid speech.

Recently, I rejoiced to see him do an act which moved me mightily in that warm regard which members of the Bar entertain for their exalted colleagues on the Bench. A young member of the Bar, Mr. Ifor Lloyd, appearing alone for the respondent in a case in which Schiller, K.C., led for the appellant, made an admirable and successful speech. I observed a note pass from Slesser, L.J., to counsel; and I assume that it was in recognition of a good forensic performance under the testing conditions of a first appearance in that Court.

A kindly act, in accordance, if I may respectfully say so, with the best traditions of the Bench.—*L.J.*, 1930, p. 336.

Mr. Justice McCardie on Perjury.—We print this week a report of the lecture on "Truth," which Mr. Justice McCardie gave to the Medico-Psychological Association on November 20. Every application of Law depends on the facts to which it has to be applied, and unless the facts are truly known, the application of the law must be wrong. It was, we believe, Lord Russell of Killowen who, as Sir Charles Russell, used to insist on the primary importance in each case of getting at the facts. It is like the old adage of the pennies and the pounds. Take care of the facts, and if the law will not take care of itself, at least

you have put it in the right groove, and the rest is mere argument—interesting, but still quite a minor matter. And so the learned Judge could not take a higher or a more practical theme than "Truth"; so high and so practical that Lord Bacon made it the beginning of the concentration of wisdom known as his Essays. "No pleasure is comparable to the standing upon the vantage ground of truth." But unfortunately, Mr. Justice McCardie speaks rather of the absence of truth than of truth itself. He has had a long experience at the Bar and on the Bench in the Civil and Criminal Courts, and has come to the conclusion that much evidence is tainted either by self interest or bias, while in addition, wilful perjury has never been more rife than at the present time. It appears, indeed, to be one reason of the excessive costs at which people are grumbling, for if perjury could be stopped, the length of trials, says Mr. Justice McCardie, would be shortened, and that, of course would mean a lessening of costs.—*L.J*, 1930, p. 345.

Two Voices.—But

> "Two Voices are there; one is of the Sea,
> One of the Mountains; each a mighty Voice"

And so from the voice of the eminent Judge whose experience has been in the Criminal and Common Law Courts, we turn to another voice which sounds from the Courts of Equity. Mr. Justice Eve, also speaking among the men of science, though after a festivity which was not a prelude to his brother Judge's lecture—the 268th anniversary dinner last Monday of the Royal Society—rejects the charge of perjury in the Civil Courts, though he thinks it may well be that perjury is not an unusual accompaniment to the sordid stories which are told in the Criminal and Divorce Courts. It is an admission which seems to give the game away, for while Mr. Justice McCardie did not exclude the Equity Courts from his indictment, yet it is probable that, as regards civil cases, he was specially referring only to the Common Law Courts and the County Courts. And we may assume that he would be quite willing to leave to the the Equity Judges the satisfaction of being accustomed to evidence of a less impeachable kind. And yet has it not been said of Chancery procedure: Truth will out, even in an affidavit. However, the fact probably is that the honesty of witnesses is a matter of the venue. It is high when the venue is in the Chancery Division. And elsewhere if, as Mr. Justice Eve says, it would be too sweeping an assertion to copy the Psalmist, yet

evidence has often to be received with caution. But while we naturally hesitate to pronounce between two such voices, we may at least say that Mr. Justice McCardie has uttered a timely warning.—*L.J.*, 1930, p. 345.

Expert Witnesses.—But controversy apart, Mr. Justice McCardie's examination of the idiosyncrasies of expert witnesses is a valuable contribution to the proper appreciation of this kind of evidence. A note to Mr. H. Fletcher Moulton's "Life or Lord Moulton" (p. 47) says: "My father used to quote Lord Bramwell's version of the joke about witnesses? 'There are liars,—liars, and scientific experts'—and then, of course, there's my brother Fred." Sir Frederick Bramwell was a very eminent engineer, and a doughty opponent in the witness-box. But when a scientific witness becomes a partisan for his own side, and a doughty opponent of the other side, he is not much good for the purpose of evidence. As to the facts, says Mr. Justice McCardie, expert witnesses usually agree. It is when they come to opinions that they take sides, and then they cease to be witnesses of fact. The learned Judge notices that while this is so, they take the same oath in support of the correctness of their opinions as in regard to their statement of facts. It would hardly do, perhaps, to send the rival experts to the Bench and make them sit as assessors with the Judge, though this would tend to moderate their opinions, and would make it easier for the Judge to arrive at a safe decision. The alternative would be to drop the form of their being witnesses and produce them solely for the sake of their opinions. Since, however, in such cases, the oath is very much a form, this would not alter the present position. The result is that expert witnesses must stand in a class apart, but happily, in the view of Mr. Justice McCardie, the standard of professional integrity and honour in this matter is growing.—*L.J.*, 1930, p. 346.

The Custody of a Child.—The case of *Re Carroll*, in which the Court of Appeal gave judgment on Tuesday (*Times*, 3rd instant) revives a phase of litigation which was familiar some forty years ago, when the late Dr. Barnardo, whose homes fortunately are still doing their benevolent work, sought to defend the care of his wards—or those whom he considered his wards—in the Court of Appeal and in the House of Lords (*Barnardo* v. *McHugh*, 1891, A.C. 388; *Barnardo* v. *Ford*, 1892, A.C. 326). Of course, in all contests

of this nature, the welfare of the child is the guiding consideration, though, subject thereto, the parent has the right to control its custody and religious education. As to the merits of rival denominations—Church of England, Nonconformist, or Roman Catholic—the Court has, of course, no view, and this was stated clearly—indeed, the statement could hardly be avoided—in the divergent judgments of Scrutton, L.J., and Greer, L.J. The Court, said the former, was perfectly impartial in matters of religion, for the reason that it had, as a Court, no evidence, no knowledge, no views as to the respective merits of the religious views of various denominations. "The responsibility for religious views is that of the parent, not of the Court." And Lord Justice Greer said that, from a religious point of view, the Court must assume that the welfare of the child would be adequately provided for in whatever faith she was brought up. Apart from the preference of the mother —the child was illegitimate—for the Catholic faith, the point really at issue was whether it was better for her to be brought up in an institution, or by individuals who would adopt her. Lord Justice Greer preferred the home; Lord Justice Scrutton —and it is to be presumed Lord Justice Slesser, who concurred in his judgment—the institution. Practically, of course, it depends on the kind of institution, the kind of home, and the kind of child.—*L.J.*, 1930, p. 346.

Essays and Observations.—In five lines prefacing the collection of Essays and Observations just published by Messrs. Cassel, the Lord Chief Justice says: "This little volume is explained, though it may not be excused, by the requests of many friends." One is constrained to thank those many friends. The book is not polemics, like Lord Hewart's last publication, but a bringing together within one cover of essays and addresses on the most varied topics, some of them already published elsewhere. On his own subject, Law, Lord Hewart re-affirms his support of the Macnaghten Rules, going straight to the point in his comment, in a paper delivered before the Medical Society of London, that, should an exception be made for what has been called the irresistible impulse,

"The crucial, the overriding, the dominant question would forthwith come to be, whether (the accused) was acting under an irresistible impulse. And upon what materials and with what guidance, would the jury be called upon to answer that

question? Would there be any materials or guidance at all except the medical opinion which the prisoner might be fortunate enough to be able to adduce in his favour, contradicted by the medical opinion which might be offered on the part of the prosecution?"

Welcome, also, is the inclusion of the clear and thoughtful address on Ethics, Law, and Legislation, which formed the first of the national broadcast lectures, and has already been commented on in these pages. Amongst the complimentary speeches, many will turn with interest to that delivered at the Garrick Club in honour of Lord Sankey, in which Lord Hewart recalled, in speaking of the Chancellor's leaving the Law Courts with their modest emoluments and their reasonable security of tenure, that during his eight years as "Lord Chief" he had seen no fewer than five occupants of the Woolsack, and went on:

"Gentlemen, the restraint and decorum of the first and the suave urbanity of the second, were qualities which were not so much transformed as developed in the transcendental idealism of the third, the robest pugnacity of the fourth, and now in the sublime composure of the fifth. There is, in fact, only one danger that threatens the present Lord Chancellor. He has no enemies."—*L.T.*, 1930, p. 342.

A Dickens Disciple.—Without flattery it may be said of Lord Hewart as a stylist that "he touches nothing that he does not adorn," and the Essays and Observations are studied with those apt and balanced phrases and neatly turned epigrams he has led us to expect from him. To drag witticisms out of their context is for the most part to slaughter them, but those familiar with the procedure of the House of Lords will recognise the appropriateness of the learned author's comment when, in the address to the Chancellor already referred to, he remarks of that assembly that three things at least can be said for it: "It meets late and rises early. It is troubled by few speeches. And thirdly, and above all, nobody can hear them." Passing from law to literature, Dickens and *Bardell* v. *Pickwick* furnish occasion for delightful essays. For the range and accuracy of the knowledge of the law which Dickens possessed Lord Hewart is full of generous enthusiasm, as he is for all that appertains to him. "There is," he says, laying to valiantly, "no need to dwell upon objections raised by slight minds. The hee-hawing jackasses of this world have no doubt sometimes just sense enough to perceive when Homer nods

................let us rather think of the debt we owe to an incomparable and most fertile artist who was at the same time a great human being."—*L.T.*, p. 342.

Civil Procedure.—It will have been noted that towards the end of last week the Lord Chancellor received a deputation from the London Chamber of Commerce to discuss the question of the cost of litigation. The proposals made by the Chamber were dealt with fully in this journal (*see* vol. 169, pp. 391 and 441). Last week the Lord Chancellor promised to give them very careful consideration. Meanwhile an interesting, precise and thoughtful letter appeared in *The Times* on Saturday last from Mr. Heber Hart, K.C., suggesting some admittedly drastic reforms in the civil procedure of our Courts. These consist of the abolition of the jury system, the concentration of appellate jurisdiction in one Court, a preliminary hearing before a Master by way of a natural development of the hearing of a summons for directions, the fixing (and observing) a date for trial, the "scrapping" of the greater part of our laws of evidence, a limitation of party and party costs, and the development of a "convention" among lawyers, which, the writer of the letter is convinced, "will be dictated by the professional ethics of the near future," that an advocate who thinks his client's case untenable in fact of law, shall either retire or confess how he feels about the case by simply presenting the facts and contentions of his client and then for ever holding his peace. Mr. Heber Hart has had the opportunity, as the British Judicial member of the Mixed Arbitral Tribunals constituted under the Peace Treaties, of framing a new system of procedure and of watching its working for nine years, and his opinion on the working of our existing legal system therefore carries weight.—*L.T.*, 1930, p. 389.

Two of the Proposals.—Of the various reforms suggested by Mr. Heber Hart, the two which will give rise to most controversy, are the abolition of civil juries and the abrogation of the greater part of our law of evidence. With regard to juries, Mr. Hart's suggestion is that a litigant should, except in a small cause, have the right to claim a trial by three judges, but never the right to a trial by jury. As is well known, most decisions in civil actions are at present arrived at without the assistance of a jury. All Chancery actions, most County Court actions, and very many commercial cases are tried by a Judge sitting alone. In cases where facts are technical or very complicated

a jury may not be best qualified to arrive at a decision, but we suggest the average running down action as a typical case in which their aid may be invaluable. Sharp, "thoughtless", extrovert men, used to the street, are often better able to appreciate evidence about street happenings, just as they may sometimes be in such cases more reliable witnesses than thoughtful and intellectual professional men. Much the same may be said of many a divorce case, where events have taken place in a more or less doubtful *milieu*, and of many cases in which real contact with the social class in which the dispute arises sheds illumination on the facts sought to be proved, and suggests which of two stories is the more probable in the circumstances. As regards the Law of Evidence, Mr. Hart is willing to leave standing, *inter alia*, the rules excluding leading questions in examination-in-chief and permitting questions relating to credit in cross-examination, but he would allow a Court, subject to any special order made in a cause, to receive "any materials . . . . which in the opinion of the Court are of probative value as evidence or information" on the questions at issue. He suggests that, as matters now stand, discussions as to the admissibility of evidence consume more time than would be taken in receiving unimportant testimony. Without some experience of the order of things contemplated it is difficult to say whether counsels' efforts to establish probative value, together with the time taken in admitting evidence not now admissible, would not greatly exceed the time said to be wasted under present conditions.—*L.T.*, 1930, p. 389.

The Imperial Conference.—With the publication of the official Summary of Proceedings it becomes possible to estimate something of the constitutional importance of the work of the Inter-Imperial Relations Committee of the Imperial Conference recently dispersed. Viewed from the lawyer's standpoint its proceedings have been, although formal, in fact basic, for a great part of its task has been to confine within the limits of draft legislation which the Home Government is bound to promote the spacious and significant concessions made in 1926. What we are wont to call Parliament is in the Report carefully designated as "the Parliament at Westminster", and "colony" and "possession" will twelve months from now, if all goes according to plan, cease to have any legal significance in relation to the Dominions. This latter term henceforth has a definitely legal and not merely a popular meaning, the exact reverse of that implied by its derivation. The restrictions placed

on Dominion legislation by the Colonial Laws Validity Act will be revoked by the Act embodying the decisions of the Conference, which will contain the following clauses:

(*i*) The Parliament of a Dominion has full power to make laws having extraterritorial operation.

(*ii*) No law....made....by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom........and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act........in so far as the same is part of the law of the Dominion.

(*iii*) No Act of Parliament of the United Kingdom ....shall extend or be deemed to extend to a Dominion as part of the law in force in that Dominion unless it is expressly declared in (the proposed) Act that that Dominion has requested, and consented to, the enactment thereof.

Tradition will be honoured in the name of the measure, which it is suggested should be styled the Statute of Westminster.—*L T.*, 1930, p. 435.

The Crown.—Under the proposed new arrangements the relations between His Majesty as the head of the Commonwealth and the Dominions as members will, however, continue to be real and significant The Governor-General of a Dominion having a new position as "representative of His Majesty only," it is suggested that changes in the method of appointment flow naturally therefrom. The report states, therefore, that the parties interested in his appointment are His Majesty, whose representative he is, and the Dominion concerned; that the constitutional practice applies that His Majesty acts on the advice of responsible ministers, and that such are the Dominion ministers, who tender formal advice after informal consultation with him. The peculiar qualities of our unique constitution are well illustrated in the addition:

The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government. His Majesty's Government in the United Kingdom have expressed their willingness to continue to act in relation to any of His Majesty's Governments in any manner in which that Government may desire.

In spite, too, of much discussion, no change has been made in the arrangements touching the reference of cases to the

Judicial Committee of His Majesty's Privy Council. Finally, just following a suggested recital to the new statute setting out the legislative independence of the Dominions, comes a recital as to their relations with the Crown which brings home the reality of the issues involved:

> Inasmuch as the Crown is the symbol of the free association of the Members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the Members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

Contrary to the anticipations of the law press, the conference has—probably wisely—turned its back on any permanent court for the solution of disputes between members, but provides for a voluntary tribunal of five members constituted *ad hoc*.—*L.T.*, 1930, p. 435.

Civil Judicial Statistics.—The leanness of recent years so far as litigation is concerned is illustrated by the decline in the work of the appellate courts recorded in the statistics for 1929. The Court of Appeal touches low-water mark with but 456 appeals, while the House of Lords had 60, again the lowest for many years if we except 1927, when it had 58 cases only on the list. The total proceedings commenced in the High Court in 1929—103,377—shows an all-over increase of 3·6 per cent. This is the result of a slight improvement in the King's Bench, Chancery work having declined 1·2 per cent., in spite of increased activity in Companies (Winding-up) cases, and the Probate, Admirality and Divorce on this occasion remaining practically stationary. In the recent discussion regarding the exercise of discreation in devorce cases comment was made as to the difficulty in securing uniformity of principle caused by the fact that large numbers of divorce cases were now taken at Assizes. In this connection it is interesting to note that, although there was a noticeable decrease in the matrimonial petitions filed at District Registries in 1929, there were still 1376 which came before judges of the King's Bench Division at the Assize towns exercising jurisdiction in divorce—something like one-third of the whole number. It is somewhat surprising that of the divorce cases taken on Assize rather more than half should have been

those of poor persons, and the figures will doubtless be noted as passibly affording some confirmation of the suggestion that in undefended divorce cases the poor persons' procedure is not infrequently abused. The bulk of the proceedings brought by poor persons have, as in former years, been matrimonial, and if proof were needed of the careful scrutiny given to applications, it would be furnished by the fact that 97 per cent. of the suits to which poor persons were parties were successful. County Court proceedings, as the Profession is aware, continue to increase in number, the 1929 figures exceeding those of 1928 by as much as 12,189; on the other hand, appeals therefrom have fallen by 19 per cent. Finally, the large number of appeals to Quarter Sessions from rating authorities and assessment committees entered during the year, namely, 3632, is, as is pointed out, evidence of the disputes which have arisen as a result of the new valuation lists and the special list for de-rating purposes.—*L.T.*, 1930, p. 481.

The Highway Code.—The draft code comprising the directions of the Minister of Transport for the guidance of road users, provided for by section 45, sub-section (1), of the new Act, has been awaited with general interest, and not least so by lawyers. For, although the code is not law, it is enacted that failure to observe its provisions may be relied upon by any party as tending to establish or to negative any liability that may be in question in either civil or criminal proceedings. Its keynote is set in the first paragraph, which lays stress on the duty to the community laid on all road users as responsible citizens not to endanger or impede others in their lawful use of the King's Highway, and it is to be hoped that its nominal price of 1*d.* will secure a practically universal circulation for what is a comprehensive and moderate body of directions. No reference is made to the much argued question of the dimming of headlights, but the unqualified pronouncement under Cross Roads that it is the duty of a driver on a minor road, when approaching a major road, to go dead slow and to give way to traffic on it, will doubtless come to be conclusive in collision cases, although there may occasionallly still be room for argument as to what is a major and what a minor road. The suggestions in the code, while mainly turning on the question of safety, extend also in parts to the inculcation of mere good manners, and it is heartening, for example, to find included under Motor Horns the precept that "they should never be used to express annoyance or impatience." This suggestion, if observed, would

lessen appreciably one of the minor irritations of London life. The code has, under the Act, to receive the approval of both Houses before it is issued, and further comment at this stage would be useless.—*L.T.*, 1930, p. 505.

New Motoring Offences.—The appearance of the Road Code is a remainder that several not uncommon road practices are under the new Act transferred from the realm of things lawful but not expedient to that of things forbidden by law. To mention only a few, it is doubtful whether the average motorist realises that under S. 49, already in force, it is an offence to neglect directions given by a police constable engaged in regulating traffic, or that, under S. 50, it is now an offence to leave a vehicle "in a position or in a condition or in circumstances likely to be dangerous." Another prohibition in operation is that which not only forbids more than one person to ride pillion but also forbids the one pillion-rider to be carried otherwise than sitting astride and on a "proper" seat securely fixed to the cycle (S. 16). Finally, it is an offence under S. 29 of the Act to take hold of a motor vehicle for the purpose of being towed, while joy-riding entails on summary conviction a maximum fine of £50 or not exceeding three months' imprisonment.—*L.T.*, 1930, p. 505.

Capital Punishment.—The Committee on the above subject, whose chairman was the Rev. James Barr, has reported in favour of a five years' experiment in the abolition of the death penalty. Too short a time has elapsed since the appearance of the report for it to be possible in this issue to give any considered opinion on the pronouncements of its authors. The General Summary, however, is certainly unusual for a publication of the kind, and leaves an impression rather of a humanitarian recoil from the taking of life than of a judicial conclusion as to the best means of preserving it. The report certainly does nothing to dispel the lawyer's partiality for a chairman trained in the estimation and formulation of evidence. That the abolition of the death penalty would not seriously inconvenience the administration of the Home Office, while it has relevance, hardly seems a first class argument in its favour. However that may be, the document suffers in the public estimation from the fact that two-fifths of the personnel, including apparently three out of the four lawyer members, saw fit to dissociate themselves altogether from the report.—*L.T.*, 1930, p. 505.

The Acceptance of Gifts by Corporations.—In the litigation between Sir Walter H. Cockerline and the Crown, carried unsuccessfully by the former to the Court of Appeal last week, the main point was whether assessment was a necessary condition precedent to the tax, and that was decided against the appellant. There was argument on another issue, however, namely, whether if by way of settlement of a dispute, certain money was paid to the Crown in respect of tax, and it was discovered afterwards that there was over-payment, receipt of the excess by the Commissioners of Inland Revenue was *ultra vires*, on the doctrine that the Crown cannot accept gifts. It was not necessary to decide this point, but the judges made no secret of their opinion that it was unsound, one pointing out that successive Chancellors of the Exchequer had received "conscience money" for generations without question. No doubt, once the money was handed over, the uneasy penitent would let it remain where it was, else his act of restitution would fail to benefit his soul, not to mention that, if he attempted to recover it, his identity would be made public against his desire. Naturally enough, therefore, the legality of the receipt of conscience money has not been tested. That the Crown is entitled to receive a gift, however, is fully apparent from such authorities as *Nightingale* v. *Goulburn*, (1848) 2 Ph. 594 and *Ashton* v. *Lord Langdale*, (1851) 4 De G. & Sm. 402. In these cases certain bequests were in terms made to the Queen's Chancellor of the Exchequer, and to the Commissioners of the Sinking Fund respectively, but they were, in effect, gifts by testators to the servants of the Crown as such, and so, in effect, to the Crown as a Corporation sole. In *Newlands* v. *A.-G.*, (1809) 3 Mer. 684, a bequest to the Government in exoneration of the National Debt was directed to be transferred to such person as the King, under his sign manual, should appoint. The question whether statutory bodies, whose powers are strictly defined by their Acts, can receive gifts (as distinct from bequests) as an inherent power of every legal entity, does not appear to have been expressly decided. A parish council has express statutory power to accept gifts, *see* Local Government Act, 1894, s. 8 (1) (*b*), which perhaps might afford some argument that such power must be explicitly given, but in *Slater* v. *Burnley Corporation*, (1888), 59 L.T. 636, it was held that a voluntary payment to a waterworks authority was not recoverable. A statutory body is presumably of benefit to the community, otherwise it would not be allowed to exist, and, if the proposition that gifts increase the power of rediating benefit is conceded, it

would no doubt be held that the law authorises them.—*S.J.*, 1930, p. 709.

Once a Highway always a Highway.—The fundamental principle that public rights in a highway, once proved to exist, cannot be released or extinguished except by statute or in a formal and legal manner by an order of the justices under the Highways Acts, has just been strikingly illustrated by the fact, as reported, that a certain rural district council has discovered that it is liable to repair a highway set out in an enclosure award made 117 years ago, and apparently forgotten almost ever since. *Turner* v. *Ringwood Highway Board*, L.R. 9 Eq. 418, is a decision to that effect. And now, according to a recent article in *The Autocar*, 22nd August, it is proposed to reconstruct and make fit for modern traffic a long stretch of one of the old Roman roads—the Ermine Street—in the County of Lincoln, a country which for some reason possesses the somewhat doubtful privilege of being governed by three county councils. Most of the Ermine Street, which leaves London over the Kingsland Road, is a good main road to this day, forming the old, until it joins the Great, North Road. But a short distance south of Grantham, the modern road diverges to the west, and from thence to Lincoln, nearly 30 miles, the Roman road proceeds in a straight line on the map, though some of its course is now and probably has long been grass-grown and abandoned as a highway. The question arises whether it can be said that a Roman road, made centuries before the English common law came into being, is a highway within the principle "Once a Highway always a Highway," which was restated by Swinfen Eady, J., in 1908: *St. Ives Corporation* v. *Wadsworth*, 72 J.P. 73. In legal matters and origins the reign of Richard I is the dawn of history, behind which we are not expected to look. There can be no doubt, however, that the Roman roads lasted, as they were built to last, right through the mediæval period into later times; they were the royal routes, or King's highways, and for a very long time there were no other country roads to speak of, and until the middle of the eighteenth century, no other hard stone-made roads at all. Being highways at common law, therefore, no amount of disuse, enclosure or stopping-up, except under lawful authority, strictly proved to have been exercised, can abrogate the public right to use them, and the County Councils of Lindsey and Kesteven, through whose areas the Ermine Street runs, can proceed to restore it to modern use in spite of the

fact, if it be so, that portions of it have become barely distinguishable from the surrounding fields. Should there be any section, however, to which all public access has been cut off by the destruction or lawful stopping-up of highways leading into it, legal difficulties may arise with the owners of the land through which the track passes: *Bailey* v. *Jameson*, 1 C.P.D. 329. But this appears unlikely. Otherwise it seems to be merely a matter of time and a money grant by the Ministry of Transport in aid of unemployment, which we believe has already been applied for, before the full use of Ermine Street is restored to a busier life than it ever knew before. This is not the only place in the country where a disused, or little used Roman road could, with great advantage to modern traffic conditions, be reconstructed.—*S.J.*, 1930, p. 710.

Relief against Forfeiture where Lessees are Joint Tenants.—The decision in *T. M. Fairclough and Sons, Ltd.* v. *Berliner, The Times*, 16th October, brings into prominence a hardship which will be inflicted when relief against forfeiture of a lease under which two or more persons hold as joint tenants is not sought by all of those persons. In that case, two persons held as joint tenants under a lease of which they had taken an assignment, and in which there were very full repairing covenants. Breaches of these were alleged by the lessor company, and were proved to the satisfaction of the Court. The defence denied the breaches, and sought relief under S. 146 (2) of the Law of Property Act, 1925. One of the two defendants, however, who appeared in person, stated that he did not join in the application for relief; and Maugham, J., took the view that that was sufficient to deprive the court of jurisdiction to grant the application. It was, he said, not accurate to describe either of the two defendants alone as the "lessee". The "lessee" in such a case, was constituted by the joint tenants together; and the elucidation of the word "lessee" in sub-section 5 of S. 146 of the Law of Property Act, 1925, did not warrant the view that relief could be granted if only one of two or more holders under a lease as joint tenants applied for it. Such a course, he said, would be unjust; for it would have the effect of restoring the lease as though there had been no forfeiture, and also of reviving the liability of the lessee or lessees who had not applied for relief to the covenants in the lease. He, therefore, refused the application, and gave the lessor company possession. The decision makes clear that relief will not be granted on the application of only one of two or more joint lessees; but it does not,

as reported, show whether it will be granted if several do apply for it and only one does not. It has apparently yet to be decided, for example, whether, if three out of four lessees who are joint tenants apply for relief and one does not, the application will be granted; if it is not granted, the majority of the lessees will suffer hardship; while, if it is granted, the lessee not asking for it, and possibly, as in the case before Maugham, J., having a perfectly good and honest reason for his attitude, will, as Maugham, J., pointed out, "continue to be liable to the covenants in the lease."—*S.J.*, 1930, p. 710.

The Dog in the Motor Car again.—The decision in *Fardon* v. *Harcourt Rivington* on which we commented in our issue of 12th July (Vol. 74, No. 28, p. 445), was unanimously reversed in the Court of Appeal on Thursday last (30th October). It will be remembered that the defendant was sued for damages for negligence in leaving his car with a dog inside unattended on the publc highway and failing to tie up the dog in a secure manner. The dog which was jumping up and down in the car when the plaintiff passed by, put its paw through the glass panel at the back of the car, causing a splinter of glass to enter the plaintiff's eye. The eye had to be removed. Mr. Justice Talbot left the question of negligence to the jury and the jury found for the plaintiff and awarded £2,000 damages. Lord Justice Scrutton, however, in delivering the judgment of the Court of Appeal, said that in his view there was no evidence that the dog had any special propensity which was dangerous, nor did the owner knew anything of any dangerous propensity. There is an obligation to keep wild animals like gorillas, tigers and monkeys under control, but no obligation to do so with regard to tame animals, such as dogs and cats, which merely exercise their ordinary propensities in jumping about. As the defendant could not, by the exercise of reasonable care, have foreseen an occurrence which had never been known to happen before, the appeal of the defendant was allowed and the verdict of the jury set aside. Motorists may now breathe a sigh of relief and continue to lock up their dogs in cars as before.—*S.J.*, 1930, p. 746.

United States Constitution and Prohibition.—The renewed effort on the part of certain American States to secure the repeal of the prohibition law brings out once again a cardinal point of difference between the constitutional machinery of the United States and that of our own country. The framers of the con-

stitution of the United States took great pains to ensure that their handiwork should not be affected by hasty and ill-considered alterations, and, accordingly they provided that amendments could be effected only if certain preliminary conditions were fulfilled. Article V says that "the Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress." It is thus no easy matter to alter the fundamental laws of the United States. In this country fundamental laws are theoretically as easily altered as any other, seeing that Parliament is supreme in the domain of legislation. There is a good deal to be said in favour of the American plan of forbidding any tampering with the national compact save under exceptional circumstances, and only on compliance with certain conditions. Another point of difference between the constitution of our kin beyond sea and that of England is that it is competent in the United States to question the validity of legislation if it is said to offend against the constitution, and very often the Supreme Court is called upon to pronounce whether a particular Act of Congress is or is not within its competency. In this country the Courts are bound to accept the statutes as of binding force whatever their effect may be.—*S.J.*, 1930, p. 760.

Impatient Jurors.—When the hearing of a case seems in danger of being unduly prolonged, the Judge, on requesting counsel to try to be more brief, has frequently taken up arms on behalf of a patient jury. The members of the jury, he may point out, have probably been called away from important business duties and been compelled to pass many valuable days listening to unnecessarily drawn-out evidence. Whether juries are by nature patient, or whether the forensic atmosphere has a subduing effect upon them, it is, in fact, only very rarely that a complaining voice is raised in Court against what is often a wearying task. To do so must, indeed, require a high degree of moral courage. At the Central Criminal Court recently, when counsel was cross-examining on points of character, one of the jurymen asked "What has it got to do with the case?"

—probably a not unnatural question from one not particularly familiar with the extent to which questions as to credit may go. Sir Ernest Wild, K.C., the Recorder, told him that it was his duty to listen, and he must be patient, an admonition which caused the juryman to expostulate that he had been there three weeks. This, apparently, to put it mildly, was an over-estimation, for on the following morning the Recorder, having caused inquiries to be made into the juror's complaint, said that it appeared that he had, in fact, only been in the jury box, for six days, the sessions only having lasted a fortnight to that date. The juror apologised, and added that if he had caused any annoyance it was not meant. "One of the things we try hardest in this Court to do," replied the Recorder, "is to study the convenience of juries." It certainly must require the patience of Job to listen to intensely dull evidence over perhaps a period of weeks when one's own business affairs are calling for urgent attention, but to serve on a jury is a duty demanded by the State of its citizens, a duty which assists in ensuring a fair deal for litigants in civil actions and for the accused in criminal prosecutions. A juror of to-day may, indeed, be truly thankful to-morrow that he has "twelve good men and true," or may be a woman or two, to decide the merits of his own case. "Just think," said Lord Darling on one occasion to a juror who complained that he was wasting valuable time without receiving remuneration, "how pleased you will be, if ever you have to be tried, to reflect that you are getting a jury for nothing."—*S J.*, 1930, p. 775.

BOOK REVIEWS.

THE LAW OF INSOLVENCY IN BRITISH INDIA, by Sir D. F. Mulla, *Kt.*, Advocate, High Court, Bombay. Tagore Law Lectures, 1929. Published by James & Co. Available at or sold by N. M. Tripathi & Co., Book-sellers, Bombay. Price Rs. 12.

The Tagore Law Lectures have been the occasion in some cases of the production of the treatises of first-rate importance on some branches of law which have been looked upon as of the highest authority. Among these may be mentioned the classical treatises on the Law of Mortgages by the late Sir Rash Behari Ghose, the Law of Limitation and Prescription by the late Mr. U. N. Mitra and the Law of Marriage and Stridhanam by the late Sir Gurudas Bannerjee. We are glad to find that the services of Sir D. F. Mulla have been secured for the exposition of the

subject of Insolvency Law in India. The subject is one of growing importance and complexity in this country at the present time. We have had the pleasure of going through some portions of the book and find that the learned author has used his great analytical power which is quite familiar to lawyers and Judges in illumining this branch of law. The lucidity of the statement of the law by the learned author and the appropriateness of the authorities cited by him for the propositions enunciated are too well known to need repetition. The learned author's suggestions for the improvement and amendment of the Acts will command the respectful attention of the Legislature. We have every hope that this volume will be a most useful addition to every lawyer's library on a subject of almost daily interest.

THE INDIAN STATES, by Sirdar D. K. Sen, M.A., B.C.L. (Oxon). Published by Messrs. Sweet and Maxwell, Ltd., 1930. Price Rs. 7-8-0.

Mr. Sen's treatise is a vigorous statement of the princes' case and is on the lines in regard to treaty rights of the arguments of Sir Leslie Scott on behalf of the princes before the States Committee. In this respect, Mr. Sen's view of treaty relations is at variance with the report of the Butler Committee and the reasoning underlying the report which has been elaborately set forth and developed in Professor Holdsworth's article in the *Law Quarterly Review* of last year. He is for literal and rigid adherence to the terms of the treaties and is for ignoring all usages and conventions which have grown up in the relations between the Government of India and the States. He takes exception to the Manipur resolution of the Government of India in which it was laid down that the principles of International Law have no bearing on the relations between the Government of India and the States under the suzerainty of the Crown and to the terms of the now famous Lord Reading's letter to His Exalted Highness the Nizam of Hyderabad. Mr. Sen takes up the position that the Government of India has been unjustly interfering with the internal autonomy and sovereignty of the States including fiscal matters by a too elastic and comprehensive interpretation of paramountcy. He holds the view that by no conceivable principle can the position of the paramountcy of the Crown be the source and justification of the jurisdiction attempted to be exercised by the British Government over foreigners within the territorial limits of the Native States. In regard to the question of the relationship of the Crown to the Native

States, Chapter VII of his book is to a large extent a restatement of the arguments of Sir Leslie Scott. While Mr. Sen seems to think that the treaty relations with the Crown do not entail the maintenance of a particular kind of constitution in the United Kingdom, he puts forward the case that the devolution of the rights and responsibilities of the Crown on a British Indian democratic constitution will be inconsistent with the treaty relations of the Crown. The line taken up by Mr. Sen does not fit in with the now well-accepted principle that there is nothing to prevent the Crown from entering into a treaty in the right of a particular territory within the British Empire, and there is no reason why the treaties entered into should not be in the right of the Crown's British Indian territory. There is no satisfactory reason vouchsafed why the Crown in conjunction with the Parliament cannot erect any kind of constitutional machinery for the purpose of tendering advice to the Crown and for enabling the Crown to execute the treaties. To the extent that such a constitutional machinery is erected in India, it will be as much His Majesty's Government as His Majesty's Government in the United Kingdom.

THE ELEMENTS OF CRIMINAL LAW, by Guffar Syed, M.A., LL.B. Price Rs. 2.

This little book deals with the elementary principles of Criminal Law as administered in British India. One feels much profit may not be derived from such a short and inadequate summary of some of the sections of the Indian Penal and Criminal Procedure Codes, though we are not slow to agree with the author that this may suffice to be of some guidance to such of the citizens that are quite unacquainted with the law but yet who may be called upon to serve the State as Honorary Magistrates.

We wish to add that greater care and execution could have made the volume more attractive.—*K.C.*

TRIPATHI'S LAWYER'S DIARY, 1931. Price Rs. 2.

This fine diary contains, apart from the usual attractions of a diary of this kind, a few important sections of the Civil Procedure Code as well as Court Fees Act, etc. This diary gives a page for each day and is excellently got up. We have no hesitation in recommending this to the members of the Bar. —*K.C.*

THE INDIAN SALE OF GOODS ACT OF 1930, by N. N. Sahni, B.A., LL.B., Advocate, Lahore High Court, 1930. Published by Punjab Law Reporter Office, Lahore. Price Rs. 2-8-0.

The enactment of the Sale of Goods Act has brought forth a number of annotations on the Act by various authors; the book under review is one of them. The author has given the notes under each one of the sections with reference to the language of the sections and the decisions under the corresponding provisions. He has also drawn attention to the provisions of the Indian Contract Act corresponding to the sections of the new Act and the differences between the two enactments. The case-law has been brought up to date. A few forms are also given in the end by way of an appendix. We hope that the book will be found useful by those having occasion to use it.

THE LAW OF EQUITABLE MORTGAGES IN INDIA, by Narotam Singh Bindra, B.A. (Hons.), LL.B., Advocate. Published by Students' Popular Depot, Lahore. Price Rs. 2.

The learned author has in the course of 60 pages in this small book dealt with the incidents of what are perhaps loosely called equitable mortgages in this country but which are really legal mortgages though effected by the deposit of title deeds. That such mortgages do not really partake of the characteristics of equitable mortgages strictly so called in England, was clearly pointed out by the Privy Council in *Imperial Bank of India v. U. Rai Gyaw Thu & Co., Ltd.*, (1923) I. L. R. 51 Cal. 86. Excepting the mode of its creation a mortgage by deposit of title deeds in this country has all the legal consequences of the other kinds of mortgages. As to what documents of title have to be deposited to create a mortgage, the English cases may have some bearing. The learned author has dealt with the questions that commonly arise in this class of mortgages; he has also given some forms to accompany the deposit of title deeds. The latter portion of the book is taken up by the reproduction of the whole of the Transfer of Property Act though the whole of it does not really bear upon the subject. A list of cases referred to in the book towards the beginning or the end of it would have been of great use.

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SECTION 150, CIVIL PROCEDURE CODE: ITS SCOPE AND EFFECT.

Section 150, Civil Procedure Code, has been the subject of much criticism of a varying nature. No one could deny that when business of whatever nature is transferred in whatever manner, from one Court to another, the latter Court should ordinarily have the same powers and perform the same duties as those respectively conferred and imposed by or under the Code of Civil Procedure upon the former Court. There are certain special provisions in the Code by which the first Court retains some powers exclusively for itself and section 150, Civil Procedure Code, is careful in not extending its operation to those provisions. It is an enabling provision enunciating an existing rule of law. It operates generally and in cases where special provisions are not made or where those provisions are found insufficient.

The wording of the section makes it clear that no *powers* of transfer are conferred under it; it only states what shall happen as a result of a transfer. It does not attempt to lay down how transfers could be made, whether by special orders of Court acting under the provisions of the Civil Procedure Code, or by official notifications in the Government Gazette as to change of jurisdiction. It would, therefore, be incorrect to speak of transfers under section 150, Civil Procedure Code, as we speak of transfers under section 24, Civil Procedure Code. Discussions are to be found in cases as to whether section 150 applies to pending proceedings; whether it applies to a transfer under section 24, Civil Procedure Code or only to a transfer of business as a result of a change of jurisdiction; whether it

operates when a partial transfer of business is made or only when there is a complete transfer, *i.e.*, when a Court ceases to exist and another is substituted for it and lastly whether it applies to execution proceedings.

The first thing to note is the effect of the opening words "Save as otherwise provided". When the question of applying section 150 arises, look for special provisions, if any, dealing with the subject-matter. If there are none or if they do not satisfy the requirements then only think of applying section 150. The next question is, what is meant by "business of a Court." The business of a Court is to act within its jurisdiction, *i.e.*, to exercise the jurisdiction conferred upon it. The jurisdiction is conferred by Chap. III of the Civil Courts Act. It may be (*a*) over the parties, (*b*) over the subject-matter, (*c*) local, and (*d*) pecuniary. If the Local Government or any other subordinate authority empowered under the said Chap. III takes away from one Court any portion of the four kinds of jurisdiction and gives it to another Court, there is to that extent a transfer of business from one Court to another. Such transfers are usually made by official notifications. They may affect proceedings which have come to a close and also those that are pending, as they will certainly govern institutions in the future.

As regards execution proceedings, it has been shown in a previous article (*"Transfer of Territorial Jurisdiction and Execution Applications"*)[1] how problems arising out of a transfer of jurisdiction can be solved, as they have to be, without reference to section 150. We shall now examine some cases on the subject and see if the application of this section thereto is either necessary or justifiable.

The section was first discussed by Sadasiva Aiyar, J., in *Subbiah Naicker v. Ramanathan Chettiar*[2]. This case, specially Justice Sadasiva Aiyar's interpretation of the section and its application to execution proceedings, has been the cause of innumerable difficulties and confusing problems created thereafter. In execution of a money decree, the Srivilliputhur Munsif's Court attached certain properties and the sale was finally fixed for some day in 1910. Meanwhile, when the Ramnad District was newly formed, these properties were allotted to the jurisdiction of the Additional District Munsif's Court of Tinnevelly. The decree-holder filed an application in the Tinnevelly Court

1. 58 M.L.J. 1 (Jour)
2. (1914) I.L.R. 37 M. 462: 26 M.L.J. 189.

to continue the proceedings already started in the other Court, a very proper thing to do. But the District Munsif dismissed the application. The District Judge on appeal allowed it, applying section 37 of the Code, as in his opinion the Srivilliputhur Court should be deemed to have ceased to exist to the extent of the loss of jurisdiction. He further held that section 150 did not apply to such cases, not on the ground that there are special provisions, *i.e.*, "That they are otherwise provided"; but that section 150 applied only to transfers under section 24, Civil Procedure Code, or by any similar order of a superior Court The High Court held that the Srivilliputhur Court "ceased to have jurisdiction to execute" the decree within the meaning of section 37, Civil Procedure Code. This was sufficient to dispose of the application. But it went on to state at page 472, "It seems to us on principle that unless the authority which changes venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings (affecting the property so transferred to another jurisdiction), such proceedings are also *ipso facto* transferred by the change of venue, to the new Court, the records relating to the action becoming part of the records of the new Court." The High Court came to the above conclusion not on a construction of the language of section 150 but on an interpretation of the law on the authority of certain American treatises, the reference to which proved later a matter for regret.

The principle thus enunciated involves two statements: (1) When there is a transfer of territorial jurisdiction from one Court to another, the former Court loses jurisdiction even over pending proceedings, including original suits. (2) There is no necessity for a formal transfer of these proceedings to the proper Court. As regards the first statement, the correct position seems to be that on a change of territorial jurisdiction, a Court does not lose jurisdiction to dispose of pending suits and proceedings, subject to the general principle that a Court cannot sell a property or arrest a person outside its jurisdiction But on a transfer of business by transfer of jurisdiction other than local, a Court may cease to be competent to dispose of a pending proceeding. For instance, take the case of a Court being deprived of small cause powers; or a suit say of the value of Rs. 1,500 instituted in a Court having jurisdiction to try suits up to Rs. 2,000 and subsequently reduced to Rs. 1,000. In such cases a transfer of business of this kind may affect even pending proceedings. But then the records

won't automatically go to the Courts that may be considered proper Courts; and the parties have to apply for a transfer or the superior Court has to do it of its own motion under section 24 or any section of the Civil Procedure Code. In some cases there may have to be some judicial consideration as to whether the change of venue or any other kind of transfer of business affects the competency of the Court in which the proceeding is pending. Again there may be involved in the suit more than one property situate within the jurisdiction of different Courts. So it is clear that so far as pending proceedings are concerned, some particular order may be necessary to transfer them to proper Courts. Vide *Ramanathan Chetty* v. *Alagappa Chetty.*[3]

In the case of *Kajana Venkoba Rao* v. *Sastha Aiyar*[4] Sadasiva Aiyar, J., following *Subbiah Naicker* v. *Ramanathan Chettiar*[5], said: "For similar reasons, we hold that the Tuticorin Revenue Court acquired jurisdiction over the revenue suit in question on the publication in the Gazette notification transferring the plaint area to it, and that no order of transfer by the High Court was necessary for it to acquire such jurisdiction". No doubt for the purpose of acquiring jurisdiction the Gazette notification was enough; and in fact the Civil Procedure Code could not confer such jurisdiction. But to enable the proper Court to take the suit on its file some order of the superior Court would seem to be necessary.

Another case in which section 150 would seem to have been applied unnecessarily is *Venkatachellam* v. *Seethayamma*[6]. There the District Court of Masulipatam transferred under section 24, Civil Procedure Code, a suit on its file to the Court of the Temporary Subordinate Judge of that place, which had no local jurisdiction assigned to it. After decree, a petition for execution was put in in that Court praying for attachment of some properties. In the High Court both the Judges (Sadasiva Aiyar and Moore, JJ.) agreed that the decree has to be transmitted to the proper Court for execution, and Moore, J., expressly stated that the Subordinate Judge instead of dismissing the application ought to have directed the decree-holder to apply to have the decree sent for execution to the proper Court. This was sufficient to dispose of the case. But it was argued that on a transfer of the suit by the District Court, the Subordinate Court under section 150, Civil Procedure Code, got all the powers of the District Court including

3 (1929) I.L.R. 53 M. 378: 59 M.L.J. 102.

4. (1914) 2 L.W. 255. 5. (1914) 26 M.L.J. 189.

6. (1916) 31 M.L.J. 22.

jurisdiction to attach and sell properties just as if it had been given jurisdiction over the properties. In answer to the above argument it is submitted (1) that there are special provisions in respect of execution proceedings and so it is unnecessary to invoke the application of section 150, Civil Procedure Code, (2) that territorial jurisdiction is a condition precedent to effective execution of a decree, and (3) territorial jurisdiction cannot be conferred by the Code and *a fortiori* either by section 24 or 150, Civil Procedure Code. But Sadasiva Aiyar, J., referring to *Subbiah Naicker* v. *Ramanathan Chettiar*[2], stated in *Venkatachellam* v. *Seethayamma*[6] at p. 24 that "section 150 relates to the business generally of a Court arising over the whole area or in defined particular areas within its jurisdiction being transferred to another Court owing to the change of venue effected by legally competent notifications of the Local Governments, while S. 24 contemplates the transfer of a particular case or cases pending at a particular time by a special order of a superior Court." This construction of the section is narrow in the first place by not including in it transfer of business arising out of transfer of jurisdiction other than local, and secondly, in excluding from it the transfer of particular business under section 24, Civil Procedure Code. There is no harm in applying section 150 to transfers under section 24; nor does there seem to be any point in so restricting its operation, for section 150 only says that the Court to which a transfer is made shall have all the powers conferred on the first Court *under the Code;* and the territorial jurisdiction is not conferred by the Code.

The views of Sadasiva Aiyar, J., were religiously followed by a subordinate Court and were not accepted by Oldfield and Phillips, JJ., in *Gulam Kasusha* v. *Bhuvaraha Aiyangar*[7]. The judgment in this case is short and there is no discussion of the subject. But the judgment of the Subordinate Judge is an indication as to how the views of Sadasiva Aiyar, J., expressed in *Subbiah Naicker's* case[2] have been fully utilised and expanded by Subordinate Courts. A decree of the Subordinate Court of Tanjore directed three items of properties to be sold for a specified sum of money. One of them was sold there; but as the other two items were situate within the jurisdiction of Mayavaram Sub-Court, the decree was transmitted to the latter

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2 (1914) I.L.R. 37 M. 462: 26 M.L.J. 189.
6. (1916) 31 M.L.J. 22
7. (1916) 38 I.C. 152.

Court for effective execution, and it sold these two items. There still remained a balance under the decree which had to be realised by attachment and sale of certain other properties. The decree-holder put in a petition for the purpose in the Kumbakonam Sub-Court, on the ground that the area in which these properties and the two items already sold were situate had been transferred meanwhile from the jurisdiction of the Mayavaram Sub-Court to that at Kumbakonam. If only the proper sections had been applied, it would be seen that the Kumbakonam Court would have no power to entertain the petition without the decree being transmitted to it by the Tanjore Sub-Court. Without saying that section 150 as a rule does not apply to execution proceedings, it is sufficient to say that when there are special provisions, section 150 need not be invoked. It is true that on a transfer of business, the Kumbakonam Court should have all the powers conferred on the Mayavaram Court by the Code. One of such powers is that it can execute a decree transmitted to it; and of course the Kumbakonam Court will have the power to execute the same when the decree is in turn transmitted to it by the Tanjore Sub-Court. And it does not mean that when one Court transmits a decree to another Court for execution, it is a general order to all Courts that might acquire competency to execute it.

It would have been better if the Full Bench case of *Seeni Nadan* v. *Muthuswami Pillai*[8] had been decided without reference to S. 150. Sir John Wallis, C.J., said that: "The case of direct application to the Court to which the area had been transferred was met by the enactment of the new section 150." Ayling, J., would prefer to base his proposition on section 150 rather than section 37 regarding which he confessed to considerable difficulty; and Sadasiva Aiyar, J., had very little to add to the judgment in *Subbiah Naicker's* case[2]. It is unnecessary to make a detailed criticism of this case here as it has been dealt with in the previous article *"Transfer of Territorial Jurisdiction and Execution Applications"*[1].

The case of *Aminuddin Mullick* v *Atarmani Dasi*[9] affords an illustration of a transfer of business other than by transfer of territorial jurisdiction. A mortgage decree was passed by the second Munsif of Howrah who had jurisdiction to try

1. 58 M.L.J. 1 (Journ.).
2. (1914) I.L.R. 37 M. 462: 26 M.L.J. 189.
8. (1919) I.L.R. 42 M. 821: 37 M.L.J. 284 (F.B.).
9. (1920) I.L.R. 47 C. 1100.

suits up to the value of Rs. 2,000. He was transferred and his successor was not yet vested with such powers. So the final decree was passed by the Subordinate Judge of Howrah. Then the Munsif got those powers and execution was taken in his Court. On a proper construction of sections 37 and 38, Civil Procedure Code, the Subordinate Court of Howrah ceased to have jurisdiction to execute the decree and so the Munsif's Court may be included in the term "Court which passed the decree". However, the learned Judges found difficulty in applying sections 37 and 38 and so found help in section 150.

The learned Judges in *Mahamad Kasem Ali* v. *Naimuddin Ahmed*[10] would prefer to base their conclusion on section 37 and the question what effect the words "save as otherwise provided" in section 150 have did not in the view they took of the case arise for decision. Possibly Chatterjee, J., who was a party to this case and the earlier case *Aminuddin Mullick* v. *Atarmani Dasi*[9] would like to reconsider his views on the application of section 150 to such cases arising in execution.

In *Ranganatha Rao* v. *Hanumantha Rao*[11] we find for the first time section 150 applied to a case not arising in execution. Here it is that the section finds its proper place. Spencer, J., says: "Section 150 which appeared for the first time in the Civil Procedure Code of 1908 provides for a Court to which the business of any other Court is transferred having the same powers as the Court from which the business is so transferred. But this useful provision is qualified by the words 'save as otherwise provided' and the question in the case before us is whether the wording of O. 9, R. 13 of the Code of Civil Procedure is such as to take away the power of a Court that has territorial jurisdiction over the subject-matter of a suit to set aside an *ex parte* decree passed by another Court that originally tried it" or in other words where the whole business of a Court is transferred to another Court, whether the expression "the Court which passed the decree" in O. 9, R. 13 is so definite and precise as to create an exception to the general rule introduced by section 150. A liberal construction was put upon section 150 and O. 9, R. 13 and it was held that the District Munsif's Court of Anantapur had jurisdiction to deal with the petition though the decree had been passed by the Munsif's

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9. (1920) I.L.R. 47 C. 1100.
10 (1921) 70 I.C. 210.
11. (1922) I.L.R. 46 M. 1: 42 M.L.J. 344.

Court of Penukonda. It was argued that section 150 applied only when the whole of the business of a Court has been transferred or in other words where a Court has been abolished and another substituted in its place and not to a case of partial adjustment of jurisdiction and partial transfer of business. Krishnan, J., had no hesitation in rejecting the argument as it would greatly reduce the scope and usefulness of section 150. He avoided all reference to section 37 and to cases under it; for they all refer to proceedings in execution.

A similar occasion arose in *Moiona Guruswami Naicker* v. *Sheik Mahommadhu Rowther*[12], for considering whether there is anything in the wording of O. 39, R. 2 (3) to exclude the application of section 150 by bringing it within the words "save as otherwise provided for". An order of injunction passed by the Madura Sub-Court in a certain suit was disobeyed but the petition to have the defendant punished for disobedience was filed in the Dindigul Sub-Court as there had been a readjustment of territorial jurisdiction in the areas concerned. Their Lordships Krishnan and Venkatasubba Rao, JJ., saw no difficulty in holding that the Legislature in re-drafting the section had no intention to give special significance to the words "the Court granting the injunction" in O. 39, R. 2 (3) and that therefore the operation of section 150 was not excluded.

One of the points that arose for decision in *Rajagopala Pandaratthiar* v. *Tirupathia Pillai*[13] was whether a District Court acting under section 24, Civil Procedure Code, could transfer an execution proceeding to another Court, so as to invest that other Court with jurisdiction to sell properties not within that Court's local jurisdiction. It would appear that territorial jurisdiction which is a condition precedent to effective execution could not be conferred on a Court by any section of the Code, be it section 24 or 150 and Venkatasubba Rao, J., seems to go rather too far in holding that a superior Court acting under section 24 can confer such jurisdiction. Section 24 no doubt applies to proceedings in execution and the powers under this section are not exactly similar to the powers of the Court passing the decree to transmit it to any other Court. But the view indicated above would not (as apprehended by the learned Judge) render S. 24 almost useless so far as execution proceedings are concerned. A superior Court can under section 24 transfer an execution proceeding to another Court

12. (1922) I.L.R. 46 M. 83: 43 M.L.J. 713.
13. (1925) I.L.R. 49 M. 746: 50 M.L.J. 161.

irrespective of territorial jurisdiction for the purpose of disposal of a claim or adjudication of any rights of parties that may arise in execution.

The principal authority for the proposition that territorial jurisdiction is a condition precedent to the Court selling the property is *Satrucherla Sivaskanda Raju* v. *Ramachandra Deo.*[14]

The necessity to apply section 150 to proceedings in execution arose on the facts of *Manikka Goundan* v. *Loganatha Mudaliar*[15]. But the learned Judges Venkatasubba Rao and Madhavan Nair, JJ., preferred to base their decision on the Full Bench ruling in *Seeni Nadan* v. *Muthuswami Pillai*[8]. In the previous article, *"Transfer of Territorial Jurisdiction and Execution Applications"*[1] it has been shown how this Full Bench case can have no application to the facts which were very similar to those in the case of *Gulam Kavusha* v. *Bhuvaraha Aiyangar*[7]. There was a money decree passed by the High Court on its Original Side. Under section 39, the decree was transmitted to the Sub-Court at Vellore which attached certain properties and sold only two. Meanwhile the area wherein these properties were situate was transferred to the jurisdiction of the Sub-Court at Chittoor. The decree-holder applied to the High Court (the Court which passed the decree) to withdraw the proceedings from the Vellore Court and to re-transmit the decree to the Chittoor Court. The Chittoor Court sold the remaining properties without a fresh attachment. It appears that the judgment-debtor disposed of the properties by means of a private sale after the attachment by the Vellore Court; and it was necessary that the attachment should be held subsisting. An attachment once validly made subsists until it is raised by an order of the Court or by virtue of some provisions of the Code; for instance, when a petition is dismissed on account of the default of the decree-holder. Venkatasubba Rao, J., holds that the attachment did not come to an end when territorial jurisdiction was transferred. But can the Chittoor Court sell the properties without a fresh attachment? A subsisting attachment may invalidate an alienation. But unless it is possible to say that attachment by Vellore Court is in some way equivalent to the attachment by Chittoor Court, can the latter Court effectively sell the properties? Venkatasubba Rao, J.,

1. 58 M.L.J. 1 (Jour). 7. (1916) 38 I.C. 152.
8. (1919) I.L.R. 42 M. 821: 37 M.L.J. 284 (F.B.)
14. (1927) I.L.R. 50 M. 882: 52 M.L.J. 605 at 608, 609.
15. (1929) 30 L.W. 649.

does not accept the proposition, that in cases where attachment has to precede a sale, that attachment has to be made by the Court which sells. According to him, it would be enough if there was an attachment by whatever Court. The result would be that a Court before it sells has only to see that the property has been attached, not necessarily by itself, but by any Court, possibly not necessarily in respect of the same decree, but in respect of a different decree of a different person. The difficulty and confusion that would arise thereby is obvious.

The true remedy would seem to lie in section 150 and this is made clear in the judgment of Madhavan Nair, J. "The argument that the Chittoor Court in this case has no jurisdiction to sell the properties overlooks the provisions of section 150, Civil Procedure Code. If it can be said that when territorial jurisdiction over some of the properties subject to its jurisdiction has been transferred from one Court to another, the business of that Court is to that extent transferred to the new Court, then it is clear that by force of this section, the Chittoor Court in this case as the Court to which the business has been transferred has power to sell the properties in question without issuing a fresh order of attachment." The Vellore Court had attached the properties and so had power to sell; and the same power has been transferred to the Chittoor Court. Only two things are necessary: (1) that the Chittoor Court should have territorial jurisdiction to sell, and (2) that the Chittoor Court should have seisin of the proceedings by proper procedure under the Code. The two tests are satisfied here. If *Subbiah Naicker's* case[2] and *Seeni Nadan's* case[8] were to be followed in the way suggested by their Lordships, the decree-holder can put in a petition in the Chittoor Court without any order transmitting the decree by the High Court. But the decree-holder has rightly chosen to take that step in the High Court. It might have been equally good, if not better, if he had applied by means of an original petition, to the High Court (not as the Court passing the decree) under section 24, Civil Procedure Code, to transfer the proceedings from the Vellore Court to the Chittoor Court.

It only remains to consider the case of *Subramania Aiyar v. Swaminatha Chettiar*[10]. The learned Judges Ramesam and Devadoss, JJ., had not only to combat the views of Sadasiva

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2. (1914) I.L.R. 37 M. 462: 26 M.L.J. 189.
8. (1919) I.L.R. 42 M. 821: 37 M.L.J. 284 (F.B.).
10. (1928) 28 L.W. 885.

Aiyar, J., on section 150, but also to fight hard against the view of Sir John Wallis, C.J., and Ayling, J., that S. 150 could be applied to such cases arising in execution. Devadoss, J., states the position thus: "The opening words of the section 'save as otherwise provided' have to be given their meaning. It is only in cases which are not otherwise provided for, that the provisions of section 150 could be invoked. . . . . . There are a number of provisions in the Code which cannot be held to apply to the Court to which the business is transferred. . . . When sufficient provision is made for the proper execution of decrees, it is not proper to import into section 150 something which the Legislature did not specifically put into it and which it would have done if it was its intention to do so". But observations are made that section 150 applies only to transfer of pending business. Otherwise, in their opinion, it will lead to practical difficulties. It is, however, submitted that the difficulties will be minimised to a great extent if the section is properly applied. Further, even in their view of the case, those difficulties are sure to exist in cases of transfer of business by transfer of jurisdiction other than territorial.

The foregoing discussion leads to the following main results. The transfer of business referred to in section 150 can be made either under section 22 or 24, Civil Procedure Code or under Chapter III of the Civil Courts Act. It may affect pending proceedings also. It has to be applied when there are no special provisions in the Code; or when they fail to satisfy the requirements. Section 150 is not a provision for transfer but is only an enabling section which says what follows on a transfer of business. When a transfer of business affects a pending proceeding, the same has to be taken to the proper Court under some procedure laid by the Code; and the records won't *ipso facto* form part of the records of the other Court. If these principles are kept in view, many of the questions arising in such cases and some of the difficulties cropping up may be easily solved.

S. LAKSHMI NARAYANA AIYAR, B.A., B.L.,
Madura.

CRITICAL NOTE.

(*Order* 17, *Rr.* 2 *and* 3, *Civil Procedure Code.*)

KO THA LIN BWIN *v.* KO HLA KYE, I.L.R. 8 Rang. 168.

After the framing of the issues, the suit was adjourned to a particular date and as it could not go on on that date, it was adjourned peremptorily to a later date. On that day again it was adjourned *at the request of the defendant* on the ground that his pleader was ill. The Court particularly remarked that if the pleader should not be well by the adjourned date, the defendant must make other arrangements and proceed with the trial on that date. On that date, the defendant himself was absent. Thereupon, the Judge examined the plaintiff and a witness on his behalf and decreed the suit. The next day the defendant applied to have the decree set aside on the ground that he had mistaken the date of hearing but that application was dismissed as misconceived on the ground that the decision must be treated as one on the merits under O. 17, R. 3, Civil Procedure Code. The High Court held that the case really fell under R. 2 and that therefore the petition to restore lay.

Rules 2 and 3 of O. 17 have given rise to a good deal of controversy and it must be admitted that they are not happily worded. As they overlap to a certain extent, questions have frequently arisen as to the rule properly applicable when as here a case falls under both the rules. A strict view has sometimes been taken that R. 3 deals with a special case, that the non-appearance is really but a part of the default in the performance of the act for which time has been granted and therefore it must be applied when circumstances render it applicable. (See *Comalammal* v. *Rangaswami Aiyangar*[1], *Rangaswami Mudaliar* v. *Sirangan*[2] and *Badam* v. *Nathu Singh*.[3]) A liberal view has also been taken, namely, that R. 2 alone must be applied when a party is not in attendance as the first question for the Court on the day of hearing is "are the parties in attendance" and not "has the party done what he has been asked to do". See *Chandramathi Ammal* v. *Narayanaswami Aiyar*[4] and *Pichamma* v. *Sreeramulu*[5]. Those advocating this view are largely influenced by the considerations tellingly put by Justice Mukherji in two cases in *Ram Adhin* v. *Ram Bharose*[6] and *Ganesh Lal*

1. (1868) 4 M.H.C.R. 56
2. (1869) 4 M.H.C.R. 254.
3. (1902) I.L.R. 25 A. 194
4. (1909) I.L.R. 33 M. 241: 19 M.L.J. 760
5. (1917) I.L.R. 41 M. 286: 34 M.L.J. 24 (F.B.).
6. (1924) I.L.R. 47 A. 181.

Har Narain v. *Debi Das*[7], though the priority in situation of R. 2 over R. 3 is also relied on. An intermediate view has also been put forward that where there are materials on record for a decision on the merits, R. 3 ought to be applied, but where there are no materials R. 2 should be applied. This view is sought to be based on the difference in the words "dispose of the suit" in R. 2 and "decide the suit" in R. 3 (see *Mariannissa* v. *Ramkalpa Gorain*[8], *Enatulla Basunia* v. *Jiban Mohan Roy*,[9] *Sashibhushan Kumar* v. *Dwarka Prasad*,[10] *Har Gopal* v. *Harish Chandra*[11], *Ratna Bai* v. *Shankar*[12], *Ningappa* v. *Gowdappa*[13] and *Sher Ali* v. *Mangu*[14]) and in some cases reliance is also placed on the use of "may" in R. 3 in place of "shall" which appeared in the corresponding section 148 of the 1859 Code (Act VIII of 1859). This change, it is argued, renders R. 3 an enabling section and not compulsory and gives a discretion to the Court which has to be judiciously exercised by applying it only to cases where there are materials on record. This limited view was approved of by Mr. Mulla in the 8th edition of his Civil Procedure Code, but it has been omitted from the 9th edition. This view does not state the extent of the materials necessary for action under R. 3.

The remedies for the party aggrieved largely depend upon the rule under which the order falls and it may lead to grave injustice if the distinction should be rested on vague and ill-defined bases. It is rarely that the Court states the rule under which it passes the order, though as suggested in *Naurang Ram Sahu* v. *Bhakori Mandar*[15] it should be careful to state whether it is acting under R. 2 or R. 3 of O. 17. What is considered sufficient materials for one Judge may not be sufficient for another and a suitor will have to act at his peril in choosing his remedy to get the order vacated. In so far as the distinction is based on the difference between "dispose of" and "decide" in the two rules, it has been disapproved of in Madras in *Chandramathi Ammal* v. *Narayanaswami Aiyar*[4]. Even the liberal view may at times lead to hardship (see *Ningappa* v. *Gowdappa*[13] and *Subramania Othuvar* v. *Munusamiya Pillai*[16]) but Kumaraswami Sastri, J, points out in *Pichamma* v. *Sree-*

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4 (1909) I.L.R. 33 M 241. 19 M.L.J. 760

7 (1924) I.L.R. 47 A. 140

8. (1907) I.L.R. 34 C. 235.

9 (1914) I.L.R. 41 C 956

10 (1921) 3 Pat. L. T. 64.

11 (1918) 48 P.R. 1919

12. (1922) I.L.R. 46 B. 1026.

13 (1905) 7 Bom. L. R. 261

14 (1919) 52 I.C. 292.

15. (1919) 4 Pat. L. J. 272.

16. (1915) 39 I.C. 869.

ramulu[5], that the balance of hardship is the other way. (*See* his observations at p. 294.)

Ever since *Chandramathi Ammal* v. *Narayanaswami Aiyar*[4], the cases generally lean to the liberal view held in *Pichamma* v. *Sreeramulu*[5]. But in *Jhanda Singh* v. *Sadiq Muhammad*[17] the strict view is stated though in the case there were materials for decision, the case having been adjourned for arguments. The case is almost like *Anandaraju* v *Venkataraju*[18] where the materials were complete It may require reconsideration. Broadway, J., has to a certain extent misread *Pichamma* v. *Sreeramulu*[5], *Mariannissa* v. *Ramkalpa Gorain*[8], *Enatulla Basunia* v. *Jiban Mohan Roy*[9] and *Phul-Kuer* v. *Hashmat Ullah Khan.*[19] He relies on *Badam* v. *Nathu Singh*[3] and *Naganatha Aiyar* v. *Krishnamurthi Aiyar*[20] which have not been followed in the later cases. From the observations of Wallis, C.J., at page 290 in *Pichamma* v. *Sreeramulu*[5] that "in so far as we laid down in *Chandramathi Ammal* v. *Narayanaswami Aiyar*[4], that the two rules must be read as mutually exclusive, I think we went too far," it is too much to infer that His Lordship differed from his brother Judges. His Lordship begins his judgment by saying "I am of opinion that *Chandramathi Ammal* v. *Narayanaswami Aiyar*[4] was rightly decided" and later proceeds to say that in a case where the plaintiff appears, leads evidence and gets a decision in his favour on the merits, the Court may act under R. 3 but even that disposal will be none the less both in fact and in law *ex parte* and the decree will be liable to be set aside by the defendant under O. 9, R. 13. *Mariannissa* v. *Ramkalpa Gorain*[8] specifically disapproves of *Rangaswami Mudaliar* v. *Siranqan*[2] and *Comalammal* v. *Rangaswami Aiyangar*[1] and at page 239 states that if the case falls under S. 157 (O. 17, R. 2), then even though any of the contingencies contemplated by S. 158 (O. 17, R. 3) has happened the Court may proceed under Chap. VII (O. 9). In *Enatulla Basunia* v. *Jiban Mohan Roy*[9] the observations were all *obiter* in the view that the Judges took that the Subordinate Judge proceeded under R. 2, the adjournment not having been at the instance of the parties.

1 (1868) 4 M.H.C.R. 56 2 (1869) 4 M.H.C.R 254
3. (1902) I.L.R. 25 A 194. 4 (1909) I.L.R. 33 M 241: 19 M.L.J. 760
5 (1917) I.L.R. 41 M. 286: 34 M L.J. 24 (F.B.).
8. (1907) I.L.R. 34 C. 235. 9. (1914) I.L.R. 41 C. 956
17. (1923) I.L.R. 5 Lah. 218
18. (1914) 1 L.W. 428. 19. (1915) I.L.R. 37 A. 460.
20. (1910) I.L.R. 34 M. 97: 20 M.L.J. 535.

Whatever may be the result of a strict reading of the rules it will not be in accordance with justice to refuse a party who had failed to appear on the adjourned date the chance of having the suit restored for sufficient cause. (See *Ratna Bai* v. *Shankar*.[12]) We may here state that in Allahabad and Oudh R. 3 has been amended to the effect that the Court may proceed to decide the suit on the merits whether such party is present or not. In *Jhanda Singh* v. *Sadiq Muhammad*[17] Mr. Abdul Raoof, J., states "that the evidence on behalf of both parties had been given and the case being complete the Court was not bound to hear a separate argument for the purpose of deciding the suit." His Lordship's observations may apply where the strict procedure of the counsel's opening the case and letting in his evidence obtains. Even then the party who first opened the case has his right of reply. That observation cannot apply to the moffusil Courts in this Presidency where the system of opening the case is rarely followed.

It does not appear from the report of the judgment under notice, if the defendant moved for adjournment to engage a fresh vakil, if necessary, or the remark that he should engage another pleader emanated from the Court. Default of appearance in cases where the adjournment was not at his instance but to suit the convenience of the Court or both the parties does not fall under R. 3. (See *Doorga Dutt Singh* v. *Bunwaree Lall Sahoo*[21], *E. Mylne* v. *T. Koir*[22] *Enatulla Basunia* v. *Jiban Mohan Roy*[9] and *Sreemutty Toolsy Money Dassee* v. *Sreemutty Prosad Dassee*.[23]) But it is open to doubt if as *Murlidhar* v. *Dunichand*[24] would seem to suggest, it is not enough that the adjournment was at his instance but that the ground of the adjournment put by him should be the performance of one or other of the acts mentioned in R. 3.

The case under notice seems to take it for granted that if the circumstances were such that the Court ought to have acted under R. 2, then even though the Court in fact acted under R. 3, the party had a right to apply under O. 9. The proposition is not so obvious. If, in fact, the Court proceeded under O. 9, R. 6, in substance, it will be an order under O. 17, R. 2. It may be that where the judgment or order is ambiguous, then the Court may be assumed to have acted in conformity with the provisions of law. This principle has been applied

9 (1914) I.L.R. 41 C. 956
12. (1922) I.L.R. 46 B. 1026.
17. (1923) I.L.R. 5 Lah. 218
21. (1872) 19 W.R. 34
22. (1928) I.L.R. 6 Rang. 325.
23. (1898) 2 C.W.N. 490.
24. A.I.R. 1923 Lah. 281.

even where the office drew up an order or decree and thereby misled the party. (See *Kallu* v. *Lokmad Das*[23], *Nasarat Khan* v. *Manulla*[26] and *Mittadar Venkoba Royar* v. *Mittadar Kadirappa Goundar*.[27]) But where the substance of the judgment clearly shows that the Court acted under a particular rule, it will be difficult to distinguish it from the cases holding that if the rule under which the Court acts is specified, then the party must adopt the remedies applicable to that rule (*Madho Dass* v. *Maharajah of Benares*[28] *Gaura Bibi* v. *Ghasita*[29], *Ganga Ram* v. *Chhidu Singh*[30], *Raghubir Dayal* v. *Puran Singh*[31] and *Chenroyan* v. *Rama Chetty*[32]) and press the Appellate Court to rectify the error. The question has arisen under other provisions also where the Court passed orders purporting to act under a particular provision of law, though in fact it had no power to act under that rule. It has been held that such usurpation of jurisdiction rendered the orders as validly passed under the section for purposes of the remedies which the aggrieved party has to adopt. (See *Abdul Rahiman Saheb* v. *Ganapathi Bhatta*,[33] *Latchmanan Chetty* v. *Ramanathan Chetty*[34] and *Muthiah Chettiar* v. *Govinddoss Krishnadoss*.[35]) In *Namperumal Naidu* v. *Alwar Naidu*[36] the question was raised but as the Trial Judge had not stated the provision of law under which he dismissed, the point was not answered. Curgenven, J., inclined to the view that the right course is to look rather to the circumstances in which a judgment of dismissal was passed rather than to its form, to decide under which of the two rules it should be held to fall. In some cases (see *Rukam* v. *Tara Chand*[37], *Ram Adhin* v. *Ram Bharose*[6], *Murlidhar* v. *Dunichand*[24] and *Brij Chandra* v. *Subhadra Kunwar*[38]) it was held that the party must have the benefit of the proper procedure and that therefore though the Judge may state one thing, the party was entitled to pursue the remedy open for the provision which the Court ought to have followed. Kumaraswami Sastri, J., says at page 292 in *Pichamma* v. *Sreeramulu*[5], that the dismissal of the suit or the passing of a decree being on the merits, the

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5 (1917) I.L.R. 41 M. 286: 34 M.L.J. 24 (F.B.).
6. (1924) I.L.R. 47 A. 181. 24. A.I.R. 1923 Lah 281.
25. A.I.R. 1927 A. 507. 26 (1916) 32 I.C. 766 (C.).
27. (1914) M.W.N. 344. 28 A.I.R. 1925 A. 252.
29. (1911) I.L.R. 34 A. 123. 30. (1912) 9 A.L.J. 763
31. A.I.R. 1929 A. 432, 32 (1916) 3 L.W. 524.
33. (1900) I.L.R. 23 M 517: 10 M.L.J. 305.
34. (1904) I.L.R. 28 M. 127: 14 M.L.J. 436.
35 (1921) I.L.R. 44 M. 919: 41 M.L.J. 316.
36. A.I.R. 1928 M. 831. 37., (1922) 20 A.L.J. 123.
38. (1926) 95 I.C. 798.

only remedy of the party aggrieved will be by appeal or review. But the order in that case seems to have been passed under R. 3 (*see* the argument at p. 289) and yet the petition to restore appears to have been accepted. No doubt the original judgment seems to have been silent as to the provision under which it was passed. In *Chandanam* v. *P. Samsugany*[39] the order was made on the merits, but the petition to restore was allowed, and *Sukkhu Koeri* v. *Ram Lotan Koeri*[40] was distinguished as a case where the section under which the order was passed was stated. In *Maharaja of Vizianagaram* v. *Lingam Krishna Bhupati*[41] the High Court interfered in revision and set aside a dismissal under section 102 on the ground that it was not present to the Trial Judge that section 157 applied and that under it he was not bound to dismiss a suit but could have passed some other order. The reasoning can well be applied to a case where the grievance is that the Court should have acted under one rule rather than under the other. (See also *Adinarayana Chetty* v. *Narasimha Chetty*.[42]) Even then the question will remain as to the propriety of interference in revision in cases where the Judge notices the two rules and acts under one rather than under the other.

CORRESPONDENCE.

Apropos the decision in *P. R. Das* v. *Chief Justice and Judges of the Patna High Court,** Mr. R. Krishnaswami Aiyangar, Advocate, Cuddalore, writes:

Their Lordships of the Privy Council in disposing of the above appeal which raised a question of considerable importance to the legal profession in India have made certain interesting observations which require respectful attention.

They observe: (1) They do not propose to pronounce any opinion upon the contention that as immediately before the Act came into force the appellant was a Judge, he was not a person who as Advocate was entitled as of right to practise in the High Court on that date. (2) Their Lordships refrain from expressing any opinion upon the important question as to the propriety of an *ex*-Judge practising in the Courts of the Province where he has exercised judicial functions. The first point obviously raises questions of importance as to the position of Advocate

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39. (1928) I.L.R. 6 R. 766
40. (1919) I.L R. 41 A. 663
41 (1902) 12 M.L.J. 473.
42 (1931) 60 M.L.J. 167
* (1930) 60 M.L.J. 179 (P.C.).

and Judge in India, whether a Judge on appointment ceases to hold the qualification of Advocate, and if so how, if at all, on ceasing to be a Judge he may resume the position of an Advocate.

It seems to me that his qualification continues despite his appointment and that on ceasing to be a Judge he might resume the position of an Advocate. Right to practise is quite a different thing from actual practice. A person who suspends his practice for a time or who is ill and therefore cannot attend to his work is still a person who is entitled to practise. Non-user or non-exercise of a right does not destroy the right itself. During the time he holds an appointment, the practice is merely suspended or out of use as in the case of voluntary suspension or illness or may I say, as when no client resorts to an advocate. Moreover, it is only a qualification for an office, the holding of which cannot be said to wash away its foundation, *viz.*, the qualification. If the qualification ceases by reason of the appointment, will it not affect the office? For example, suppose something happens which would destroy the character of an advocate, can he still hold the office? The qualification would seem to be continuous and unimpaired by the appointment. It automatically revives when the cause of non-exercise ceases.

As to the second, it is at best only, a matter of etiquette and purity of the profession. I have heard it said that the holding of an acting appointment is not regarded as an impediment but that the holding of a permanent appointment should be so regarded. I fail to see, the reason for the difference. An advocate who reverts to the Bar, having held an appointment, temporary or permanent, is to all intents and purposes equally regarded by all concerned. The question arises, should such people be permitted to practise at all? Lawyers and Judges are so trained by tradition and equipment that nothing untoward will happen if *ex*-Judges are permitted to practise. Such cases are indeed very rare and there is no conceivable reason why any rule or convention should be built up against the privilege. Of course, a ban may have a commercial value in that it prevents work accumulating in such an office with the consequent advantage of that work being distributed among the rest. But on principle there can be no question of impropriety at all. There is little possibility of their securing any unfair advantage by reason of that circumstance. Judicial officers any day certainly rise above any delicate situation suggested to arise. The client population may entertain strange notions but that is not the true criterion.

SUMMARY OF ENGLISH CASES.

In re MOYNIHAM. *Ex parte* TRUSTEE, (1930) 2 Ch. 356.

Practice—Procedure—Evidence for petitioner—Judge holding prima facie *case established—Adjourned to enable the respondent to appeal so far—If proper.*

A debtor *M* was adjudicated a bankrupt and the trustee in bankruptcy thereafter moved the County Court for a declaration that certain documents executed by the bankrupt *M* were fraudulent preferences and void against the trustee in bankruptcy The respondents urged that the evidence let in by the trustee disclosed no *prima facie* case but the judge decided otherwise and ordered the defence to proceed. But as the respondent's counsel desired to appeal against the ruling, reserving to himself liberty to let in evidence if the appellate court should also hold the evidence sufficient to establish a *prima facie* case the judge adjourned the case for the purpose. *Held* this procedure is irregular. Once the judge has ruled that there is a case for the defendant to answer, he should not suspend proceedings in order to enable the defendant to file an appeal against his ruling. The right course is for the whole matter to be completed before the County Court Judge.

In re JOEL'S LEASE. BERWICK *v.* BAIRD, (1930) 2 Ch. 359: 99 L.J.Ch. 529.

Landlord and tenant—Lease of Stud-farm—Agricultural holding—Meaning of—Agricultural Holdings Act, 1923.

Where certain premises were laid out for a stud-farm for the breeding of either race horses or pedigree horses of some kind, it cannot be said to be a holding of an agricultural character. It may be so where the farm is used for the breeding of cattle, etc. The fact that there are in most, though not in all, of the fields in question certain plots of grass or certain portions of pasture land, does not establish the proposition that the holding is 'wholly pastoral,' where the main purpose of the letting was a stud-farm for the breeding of race horses. 'Stud-farm' means a farm in which stallions and mares are kept for breeding.

THE WILLIAM THOMAS SHIPPING CO., *In re.* H. W. DILLON AND SONS, LTD. *v.* THE COMPANY, SIR ROBERT THOMAS, *In re,* (1930) 2 Ch. 368: 99 L.J.Ch. 560.

Contempt of Court—Company—Appointment of Receiver at the instance of a debenture-holder—Publication of a statement by respondent in newspapers commenting on the plaintiff's action—Statements incorrect and misleading—If amounts to contempt of Court.

At the instance of the plaintiffs in a debenture-holder's action, a receiver was appointed by the Court, on the ground that the shipping Company was in a state of extreme jeopardy, unable to meet its debts or even pay the premiums for marine insurance. The respondent *T* was governing Director of R.J.T. & Co., who had been managers of the steamships belonging to the Company. To explain his position, he sent a statement to the newspapers but therein adversely commented on the conduct of the plaintiff in having obtained the appointment of the receiver. He did not state in it that the order was made on the ground of jeopardy.

Held, that to amount to contempt of Court, it is not necessary that the conduct should be such as is likely to influence the Judge's mind. It is a contempt of Court to abuse the parties concerned in a pending cause or matter by injurious misrepresentations, especially when they tend to hold up that party to hatred or contempt. It is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to. Especially is it so, in the case of a representative action, like the debenture-holder's action.

WILLIAMS, *In re.* RICHARDS *v.* WILLIAMS, (1930) 2 Ch. 378: 99 L.J.Ch. 476.

Administration—Estate insolvent—Administrator's right to prefer creditors—Equitable assignment of future proceeds—Whether effective preference.

An administratrix of an estate, believing the estate to be solvent, asked the auctioneers to pay 300*l.* to G and 829*l.* to P (two creditors of the estate who pressed for payment) out of the sale proceeds from the estate. The sale finally procured only 942*l.* and there were other creditors to be paid. The question was if *G* and *P* were entitled to preference over the other creditors,

Held, that the administratrix could prefer one creditor to another and that right is preserved by S. 34 (2) of the Administration of Estates Act, 1925. That right may be exercised

by actual payment or by giving a legal charge on money actually in anybody's hand or even by creating equitable assignments of future moneys to come into the hands of herself or her agents.

Quaere.—What would have happened if there had been nothing more than an agreement to pay?

In re JACKSON, MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* ARCHBISHOP OF WALES, (1930) 2 Ch. 389: 99 L.J.Ch. 450.

Will—Construction—Charitable gift—Gift to the Archbishop for the time being of Wales, to be applied by him in or towards the Church fund "or in his discretion in any manner which he might think best for helping to carry on the work of the Church of Wales"—Uncertainty of the alternative gift—Validity of gift.

Where a testatrix by her will devised a moiety of her residuary estate to the "Archbishop for the time being of Wales, to be paid and applied by him in or towards the General fund belonging to that church or in his discretion in any manner which he might think best for helping to carry on the work of the Church of Wales."

Held, the bequest was void for indefiniteness. No doubt the testatrix contemplated that the Archbishop will deal with it in one way or the other for a charitable purpose but the discretion was too wide and enabled the Archbishop to use the fund for purposes which are not charitable and there was nothing to prevent him from using for other than charitable purposes.

Dunne v. *Byrne,* 1912 A. C. 407 applied.

JACQUES SETTLED ESTATES, *In re,* (1930) 2 Ch. 418: 99 L.J.Ch 534.

Settled Land Act—Electric installation by tenant put up prior to 1925—Act giving a right to reimbursement out of capital—If retrospective—Claim by tenant for expenses incurred prior to Act, if valid.

In 1919, at a time when it could not be paid for out of capital, a tenant for life of settled estates installed on the premises electric lights and paid for it out of his own money without any expectation of any relief being afforded to him in respect thereof. After the passing of the Act of 1925, the tenant asked the Court to authorise the trustees of the settlement to apply out of capital moneys the sum spent by him for the

installation, such sum to be repaid to them out of the income of the settled land in 15 years in half yearly instalments.

Held, that the provisions of the Act were retrospective; that having regard to the fact that the expenditure is meritorious, that sooner or later and sooner rather than later there must have been an installation of electricity, and had it been made after 1925 it would have been sanctioned under S. 84, sub-sec. 2 (*a*), the order asked for should be made, repayment to be in 20 half yearly instalments.

In re *Ormrod's Settled Estate,* (1892) 2 Ch. 318, referred to and distinguished.

ELDER *v.* NORTHCOTT, (1930) 2 Ch. 422: 99 L.J.Ch. 548.

Limitation—Statute of—Claim barred as to principal—If interest accrued before the date of the principal also barred—Limits of the doctrine "interest accessory to principal".

N lent to the defendant a sum of 1500*l.*, the loan to bear interest at 5 per cent. per annum. The claim as to principal became barred on June 30, 1926, six years from the last payment of interest on June 30, 1920, but interest was claimed for the period between November 1, 1922 and June 30, 1926 (six years before the suit and the date when the principal was barred). The contention was that as each half yearly day for payment came, a cause of action accrued to the plaintiffs and accordingly, that they were entitled to claim interest not going further back than November 1, 1922, on the footing that every half year a claim for interest arose, that claim arising within six years before the issue of the writ, subject to this that interest could not be claimed after the date at which the principal money ceased to be recoverable by action.

Held, that the principal sum having been barred by the statute and the interest being claimed only as accessory to the principal and not on foot of any separate independent covenant for interest, the claim for interest accrued thereunder was also barred with the principal.

Hollis v. *Palmer,* 2 Bing. N. C. 713: 5 L.J.C.P. 264 and *Cheang Thye Phin* v. *Lam King Sang,* 1929 A.C. 670 followed.

Dubitante.—Whether the mere existence of two separate covenants one as to principal and one as to interest would make any difference.

INLAND REVENUE COMMISSIONERS *v.* DALGETY & CO., LTD., (1930) A.C. 527.

Income-tax—Company incorporated in England—Business in the United Kingdom and Dominions—Income-tax on the debenture interest deducted by the company—Payment of income-tax in the Dominions how far relievable—Finance Act, S. 27, sub-sec. (1).

A company incorporated in England was carrying on business both in the United Kingdom and in New Zealand and Australia. Its income chiefly arose from operations in the latter two Dominions. For the years in question, the company paid the full United Kingdom income-tax on all their profits and gains and also the Dominion's taxes on so much as was earned within the Dominion's jurisdiction. The company had issued debentures charging its total assets with repayment of it and in paying interest thereon had deducted the full amount of United Kingdom Income-tax Act. The question was if it can obtain relief under S. 27 in respect of income-tax paid in the Dominions on the amount of all the profits and gains that have paid double tax, or only on the residue after deduction of the debenture interest properly payable out of the profits that are doubly taxed.

Held, that the company was entitled to relief in respect of all income on which Dominion Tax had been paid If there had been no debentures the claim for relief could not have been resisted and the existence of the debentures cannot limit the company's rights and give greater rights to the Crown. It is only the application of the income that has caused the difficulty and with this the taxing authority has no direct concern. The present case is not concerned with any claims by debenture-holders. "Paid" means "paid" and not "paid and ultimately borne".

Per *Lord Buckmaster*—A case where the debentures create no security is less favourable to the Crown.

WHITLEY *v.* STUMBLES, (1930) A.C. 544.

Landlord and tenant—Landlord and Tenant Act, 1927—Business premises—Demise of hotel with exclusive fishing rights—Goodwill—New tenancy whether should include fishing rights.

By an indenture, the appellant demised to the respondents a hotel together with the exclusive right of fishing within limits described in the lease. On expiry of the lease, the lessee applied for a renewal and the referee reported that goodwill beyond

that attributable to the premises had attached to the premises by reason of the trade carried on by the respondent and that any compensation would not be adequate The question was if the lease of "premises" included also incorporeal rights, like fishing,

Held, that in strict conveyancing language the word "premises" is used as meaning the subject-matter of the habendum in a lease. In some earlier sections of the Act, there are indications that the legislature was considering primarily physical premises, such as buildings. But it is clear that it includes some incorporeal hereditaments, like easements. There is no sufficient reason to suppose that the legislature did not include not merely the actual buildings in which a trade is carried on, but also the land surrounding them, the easement granted as appurtenant to them, and any other incorporeal hereditaments which may form part of the premises in the strict legal sense of the term which are the subject-matter of the habendum.

MINTER *v.* PRIEST, (1930) A.C. 558.

Defamation—Solicitor—Defamatory statements made by the solicitor to his client about the plaintiff—Solicitor not finally engaged by the client—Privilege, limits of.

At an interview between the defendant, a solicitor, and two gentlemen, *T* and *S*, who had gone to interview him with a view to procuring a loan for the purpose of a deposit on a purchase by *S* from the plaintiff of a house, the solicitor uttered the words complained of to *S* and *T* about the plaintiff. If the money were found, the respondent was then to act as their solicitor in the transaction. The question was if the slander is privileged if the contemplated relationship was that of solicitor and client and not mere lender and borrower.

Held, if a man goes to a solicitor, as a solicitor, then, though he may not eventually be engaged, the interview is a privileged occasion. The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, may be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection." Where it is clear that the solicitor was not using the occasion honestly for the purpose of serving the client but to make a profit for him-

self out of the transaction, the statements are not privileged. Whether an occasion is privileged or not is for a Judge to decide and not for the Jury, and it is only after the Judge has ruled that it is privileged, could he put the question of express malice to destroy the privilege to the jury.

The question based on *Move* v. *Weaver,* (1928) 2 K.B. 520, namely, whether if the privilege be established, the solicitor would be protected by such privilege, notwithstanding subsequent waiver by the client left open.

BOWIE OR RAMSAY *v.* LIVERPOOL ROYAL INFIRMARY, (1930) A.C. 588: 99 L.J.P.C. 134.

International Law—Domicil—Prolonged and continued residence in England—Domicil of origin Glasgow—Absence of evidence of an animus to change the domicil—If sufficient to change domicil.

A person born in Glasgow and of Scottish domicil left Glasgow and settled with his brothers, sisters and mother at Liverpool for the last 35 years of his life and died there. He was living on the bounty of his brother. He never visited Scotland, not even for his mother's funerals. On the death of his sister he succeeded to his sister's estate and lived on it. Except the family ties, he had few other ties in England or Scotland. He left a holograph will unattested, valid under Scotch but void under English Law and in the will he referred to himself as a Glasgow man. He never seemed to have had or exercised any volition of his own except a disinclination to move.

Held, that though continued residence may in certain circumstances show that the domicil is changed though such intention did not originally exist, yet an intention to change is necessary to be proved and it cannot be inferred from an attitude of indifference or a disinclination to move. Length of residence by itself is insufficient evidence from which to infer the animus to change the domicil; but the quality of the residence may afford the necessary inference.

M'CAFFERTY *v.* MACANDREWS & CO. LTD., (1930) A.C. 599.

Appeal—Workmen's Compensation Act—Common law action for damages—Dismissal of action but compensation assessed—Claim made within six months of the accident—Action whether should be brought also within six months—Appeal, if lies from an order of common law Court assessing compensation.

A workman met with an accident on the 12th September and made a claim for compensation on the 17th February, *i.e.*, within six months. In March he commenced a common law action for damages founding on the negligence of the respondents. The action was dismissed but on application being made for it, the Court proceeded to assess compensation under S. 29 of the Workmen's Compensation Act, 1925. The Court made an award of compensation and issued a certificate of the award. On appeal it was set aside. The question was if the appeal was competent.

Held, that an appeal lies from an order in the common law action assessing the compensation payable as if it were a decree of that Court under S. 29 but on that appeal the criterion is the same as when proceedings for arbitration are taken by the Sheriff in the ordinary way. The determination is final as to fact and is only open to review as to law. Provided the claim is made within six months and notice of the accident also given as soon as possible, further proceedings become maintainable and continue maintainable till put an end to. When once in the common law action, motion is made under S. 29, the claim is within time.

Cribb v. *Kynoch, Ltd.,* (1908) 2 K.B. 551, distinguished as a case where no application was made in the action to act under S. 29.

Per *Lord Buckmaster.*—"Rights of appeal are not inherent rights—they are attached by statute to certain Courts exercising certain jurisdiction, but if a totally new jurisdiction is established it carries with it no right of appeal unless it arises through the jurisdiction being conferred on existing Courts so as to make the new matter subject to the already existing rights of appeal."

W. R. PATTON *v.* TORONTO GENERAL TRUSTS CORPORATION, (1930) A.C. 629: 99 L.J.P.C. 213.

Will—Construction—Annuity conditional upon annuitant adopting a religion—Annuitant an infant at the date of death—Change of religion permitted in law only after majority—Result of on the annuity.

In 1917, a testator bequeathed to his grandson an annuity for the term of his natural life, on the condition, "that he is and remains a British subject, and is and proves himself to be of Lutheran religion". At the date of the will the annuitant was an infant twelve years old and in the control of his mother who was, to the knowledge of the testator, a Roman Catholic. According to the German law to which the parties were subject,

a person cannot effectively change his religion without the consent of his parents during his minority. The testator died in 1919 while the annuitant was still an infant. On attaining majority he proved himself to be a Lutheran and the question was whether he was entitled to the annuities.

Held, that it is obligatory upon a Court of construction to ascertain whether, construed in association with the surrounding circumstances known to the testator, the words used are not capable of a more rational interpretation. If its strict literal construction is its true construction, that the testator intended the boy to be of the Lutheran religion then, he imposes upon the annuitant a condition impossible of performance. But the testator has given him an opportunity of proving that he is of the Lutheran religion; and that opportunity, if it is to be operative at all, must be operative at some date later than that which is in literal terms prescribed and that is when, in the eye of the Court, he is in a position truly to determine what his religion is, namely, his majority. Any other construction would involve this that these provisions were, to the knowledge of the testator, struck with sterility as soon as they were written.

SAKARIYAWO OSHODI *v.* MORIAMO DAKOLO, (1930) A.C. 667: 99 L.J.P.C. 233.

Land acquisition—Nigeria—Native lands in Lagos—Acquisition of, by Government—Compensation if payable to the Chief also for his right of reversion.

In the native lands of Lagos, the paramount Chief is the owner of the land, but he is not owner in the sense in which it is understood here. He has no fee simple, but only a usufructuary title. He may have some individual lands which he occupies himself, but as regards other lands they were occupied before the abolition of slavery by his slaves. These occupiers have the right to remain and to transmit their holdings to their offspring, but in the event of the family of an occupier failing and becoming extinct, the Chief has a right of reversion. He has no present rights to rent or anything.

Held, that the occupants were entitled to the compensation awarded. But the appellant—Chief—was also entitled to receive a portion of it as representing his reversion. In view of the fact that he has no rights which he can at present exercise by receipt of rents or otherwise, the value of the reversion may be small but it cannot be evaluated as *nil.*

Amodu Tijani's case, (1921) 2 A.C. 399, distinguished.

GILMOUR *v.* MACPHILLAMY, (1930) A.C. 712: 99 L.J. P.C. 199.

Will—Construction—Meaning of 'survivors' in "shall be equally divided amongst the survivors"—Literal or stirpital meaning.

By his Will a testator directed that the income from the rest and residue of his estate shall be held by trustees to pay the income therefrom to the whole of his children (names given) in equal shares for their respective natural lives and after the decease of the said children in a particular way: "provided however that if *any* of my said children shall die without leaving lawful issue or widow or widower living, the shares or share of the said child so dying shall be equally divided amongst the *survivors upon the same trusts and conditions.*" The testator died leaving nine children. In 1924 a son *H* and in 1927 a daughter *E* died a bachelor and spinster respectively. They were survived by two brothers and the children of the other children of the testator. The question arose as to the destination of the shares of *H* and *E*, whether surviving brothers alone took to the exclusion of the grandchildren by deceased children of the testator.

Held, that the clause could only be read as meaning "shall be equally divided amongst the survivors so that each survivor takes a life-interest with remainder to his children as in the case of his or her original share." In order to justify a departure from the natural and ordinary meaning of any word or phrase there must be found in the document itself a context which necessitates such departure. It is not enough that the natural meaning may produce results which to some minds appear capricious or fail to accord with a logical scheme of disposition.

LOVIBOND *v.* GOVERNOR-GENERAL OF CANADA, (1930) A.C. 717: 99 L.J.P.C. 178.

Appeal—Canada—Petition of Right—Refusal of fiat by Governor-General—Special leave to appeal to Privy Council—Governor-General if a 'Judicial Officer' in the matter of granting or refusing fiats.

By S. 4 of the Petition of Right Act (R. S. Can. 1927, c. 158) "A Petition of Right shall be left with the Secretary of State for Canada, for submission to the Governor-General, so that he may consider it and, if he thinks fit, grant his fiat that right be done. . . . ."

Held, that the Governor-General in deciding whether to grant or not a fiat under S. 4 of the Petition of Right Act of Canada, does not act "as a Judicial Officer" within the meaning of S. 3 of the Judicial Committee Act, 1833, and therefore there is no right to appeal to His Majesty in Council.

COLISEUM (BARROW), LTD., *In re.,* 99 L.J.Ch. 423.

Statute of Limitations—Company—Debt due to directors—Acknowledgment only in the annual balance sheets—Balance sheets signed by the Directors and passed at shareholder's meetings—If sufficient acknowledgment to save limitation.

As the Company made trading losses during several years, the Directors made cash advances to it, and also allowed their remuneration to stand over and to remain a debt due to them from the Company. The last payment to the Directors from the Company was in 1919 but every year, the debt was mentioned in the annual balance sheets of the Company which is signed by two of the directors and passed at the annual general meetings of the share-holders. The Company was ordered to be wound up in 1929 and the liquidator rejected the proof of the directors in respect of sums owing to them beyond six years from the date of the winding up, as barred.

Held, that an acknowledgment to be effective must be made to the creditor or to his agent. Had the statement been made in the balance sheet that the company owed a specified sum to a share-holder to whom the balance sheet was sent in the usual way, it would be a sufficient acknowledgment within the authorities. But here the promise, if any, is a promise by the Directors, as a board acting on behalf of the Company, to pay to themselves the amount, and that is not, in the circumstances, a promise to pay on behalf of the Company. The Directors, as agents of the Company, hold a fiduciary position and they cannot pass a resolution authorising payment to themselves, so as to bind the Company.

FUEL ECONOMY CO. *v.* MURRAY, 99 L.J.Ch. 456.

Practice and procedure—Action for infringement and passing off of patent—Defence of invalidity, how far open—Estoppel between licensor and licensee, limits of—Motion to strike off the defence of invalidity—O. 19, R. 27 (R.S.C.).

The plaintiff company were the legal owners of a patent to manufacture boilers and boiler joints under the name and

style of "Bowden Jackson." They granted an exclusive license to *C* to use the said letters patent for a term within a certain area. The defendant *M* obtained by purchase that right from *C*. In an action for an infringement and passing off, the defendant among other pleas stated that the letters patent was invalid for certain reasons and further that at the date of the said patent, the apparatus complained of was not novel. An application was taken out by the plaintiff to have these two defences struck out on the ground that as the defendant admits that he is a licensee, he is estopped from denying the validity of the letters patent. The defendant only admitted that he was the licensee *within the limited area* specified in the license but the particulars of breaches relied on were in respect of matters *outside* the area defined in the license.

Held, by the Court of Appeal (affirming Luxmoore, J.) that there is not an absolute estoppel in all cases and in all circumstances on the part of the licensee under which he is prevented from at any time and under any circumstances saying that the patent is invalid, but only an estoppel which is involved in and necessary to the exercise of the license which the licensee has accepted. A licensee is not precluded from discussing the exact extent and boundaries of the patent rights of his licensor, for this is not to dispute the existence or validity of such rights. whatever they are, which is all that he is estopped from controverting.

Per *Luxmoore, J.*—"An action for infringement is not an action under the license at all, and in such a case no estoppel arises. In the present case, so far as the infringement complained of is concerned, the license has no bearing on the case and is irrelevant. It is only referred to in order to explain the limitation which has been placed on the relief sought by excluding the area covered by the license from that relief. The action does not relate to anything which has been done under the license and the defence does not set up the license as an answer to the claim for infringement.

JOTTINGS AND CUTTINGS.

The Close of the Round Table Conference.—The Round Table Conference on India, which met last November, was brought to an end on Monday by a statement by the Prime Minister as to the lines on which efforts would be made to carry out its recommendations. During the deliberations of the Conference nothing has been more marked than the rapid

acceptance of the principle of an All-India Federation. Only faintly suggested by the Report of the Statutory Commission as a matter desirable indeed, but outside their province, it has become the basis of any constructive work that may hereafter come to fruition. This, said the Prime Minister, is due to the attitude adopted by the Indian Princes. "You showed," he said, "your patriotic interest in Indian affairs and your very wise vision regarding the future, and your words made it possible for us to build up a constitution, and to put political weight upon it, of the nature of an All-India Federation." It has been the task of a Sub-Committee, working under the Lord Chancellor, to outline the nature and powers of the Federation and its relation to the Crown, but by general agreement it cannot at once assume the full responsibilities of Government, and the Prime Minister stated the essential safeguards: reserved powers to be used in the event of a breakdown in the ordinary operation of Government; safeguards for the financial and other responsibilities which Great Britain has assumed on behalf of India; and safeguards for the respective rights of the two great communities of Hindus and Moslems.—*L.J.*, 1931, p. 55.

The Embryo Constitution.—It is, as is well-known, this last matter—the rivalries of Hindus and Moslems—which has raised most difficulty during the discussions in the Conference, and which at one time threatened to forbid any useful result. How the claims of the two diverse races are to be reconciled has not been determined, and such progress as the Conference has made has been due to the holding over of this fundamental question. In fact the Prime Minister, expressing the considered view of the British Government, says that it is the duty of the communities to come to an agreement among themselves. This means that they must agree as to their proportions of political representation; and also it must be secured that differences of religion, race, sect or caste shall not in themselves constitute civic disabilities. On this basis, if the scheme now foreshadowed is carried out, there will be a two-chamber Legislature for the Federation, and, subject to the reserved powers of the Viceroy, there will be a cabinet consisting of a Federal Prime Minister and his colleagues, all responsible to the Federal Legislature. For British India there will be Provincial Legislatures on similar lines. The position of the Indian States is peculiar, and the extent to which they surrender their rights has still to be determined. At present they are sovereign, subject to the Paramountcy of the Crown. "The Federal Government," said

the Prime Minister, "will have authority only in such matters concerning the states as will be ceded by their rulers in agreement made by them on entering the Federation:

"The connection of the States with the Federation will remain subject to the basic principle that, in regard to all matters not ceded by them to the Federation, their relations will be with the Crown acting through the Viceroy."

Although the Conference has not produced a definite constitution such as that which issued from the American Convention of 1787, and on which the United States have built their present position in the world, yet it is comparable with that Convention, and it may be hoped that the foundations have been surely laid for the All-India Federation of the future.—*L.J.*, 1931, p. 55.

Lawyers and Reforms.—It was Sir John Withers, I believe, who in July last said some hard and provocative things about the conservatism of his branch of the profession, in a different matter, which aroused great controversy at the time. "The members of the profession," he declared, "eager as they no doubt are to do the best, are so habitually critical of every proposal that they cannot collectively initiate any constructive policy."

Amidst the chaff of that sweeping assertion you will find a grain of truth. But it is surely right that lawyers of all people should examine the new thing with the greatest care before they discard in its favour the old and the tried; that they should have a good look at the new horse before they give away the old.

"Toujours l'audace" for lawyers is an indecent and undesirable watchword; and I conceive that even the liveliest judge would think once, twice, nay, thrice before decreeing that even a thousand of our 100,000 decided cases should be shot at dawn and interred in the legal graveyard. He may treat a couple of thousand as if they were dead; but that is different; for he can on occasion treat them as survivors.—*L.J.*, 1931, p. 67.

Innocent in Absentia.—A recent incident caused me to wonder whether, in the event of counsel failing to appear when his case is called on in Court, the worst should be assumed against him, and contempt of Court inferred. Personally, I should have thought that he ought, as a citizen, if not as a member of the Bar, to be assumed to be innocent until he is found to be guilty. He may have been run over in the street;

sudden illness may have prevented him; his instructions may have been withdrawn; one or more of many things may have occurred. I would assume much, until I had heard his explanation, before jumping to the conclusion that he had intended to affront the Court or that he was guilty of a neglect of duty.

Members of the Bar or Solicitors, to say nothing of their clients, have waited with me in Courts where, owing to unavoidable delay, the Judge arrived long after the appointed time; and always we have assumed that the cause of the delay was unavoidable and that the Judge deserved our sympathy rather than condemnation; and always, or nearly always, he has arrived with a courteous apology and explanation to the waiting crowd. Full often we were losers by the delay; but nice people that we were, we always, or nearly always, understood, and thought no evil.—*L.J.*, 1931, p. 67.

Cost of Litigation.—At the Annual General Meeting of the Bar on Friday last the members were no more vocal than usual. From both the Attorney-General and the Chairman of the Council, however, there were the expected references to the cost of litigation, which the latter described as "a very serious matter." It will be remembered that the Council were represented when Lord Sankey received the deputation from the London Chamber of Commerce some little time ago and that, as stated in the report, it appointed a special committee to review its proposals. Sir William Jowitt on Friday assured his auditors that the matter was under consideration and held out hopes that by next year something might be done. Sir Thomas Hughes later evoked approval from the meeting when he said that a reduction of costs would be to the advantage of both Bar and public, and he made frank admission of what is, of course, common knowledge in each branch of the Profession, that in smaller matters of litigation costs could easily exceed the amount at issue and thus inevitably deter many persons from resort to the courts to defend their rights. For some of the changes advocated by the Chamber of Commerce facilities already, of course, exist of which insufficient use is made, as was pointed out in this journal at the time; other suggestions may, as Sir Thomas Hughes hinted, not be practicable; but a report of the Bar Council will at least take the matter a good step further forward. The disproportion between costs and subject-matter in humble suits was, of course, a chief cause at the root of the establishment of County Courts, but no one in practice to-day would argue that these courts can altogether

deny the impeachment of excessive cost. Were examples required, as they are not, they would be found in the fearless and highly interesting book of Mr. Claud Mullins on law reform just published.—*L.T.*, 1931, p. 69.

In Quest of Justice.—One of the chief accusations brought against our system in Mr. Mullins' book, of which more must be said later, is the enormous cost to individuals of judge-made law, or, in other words, the hardship inflicted on litigants the adjudication of whose possibly small claims chances all unknown to them to involve the settlement of a new principle of law. These unfortunates are, as Mr. Mullins shows *in extenso,* the victims of the system, being lured from one court to another at enormous expense, "for the mere purpose of law-making." The costs required to establish the principle of *Helby* v. *Mathews,* where the House of Lords restored the judgment of the County Court, must, it is suggested, have approached the value not of a piano but of a piano factory. When the question not of evils but of remedies is approached it is found that the recommendations of the Chamber of Commerce pale before the wholesale reforms suggested by a member of the Bar with some knowledge of the working of Continental codes. Suffice it here to say that they include provision for one appeal only and for the utilization of the displaced possessors of "legal brains of an absolutely first class order" for the supervision and improvement of our private law and methods of litigation, and the dedicating of the whole energies of Lord Chancellors to the inspiration and direction of law reform.—*L.T.*, 1931, p. 69.

The Alternative Vote.—The main purpose of the representation of the People Bill is to ensure that Parliamentary elections shall "be on the principle of the alternative vote," but its long title indicates that "in that connection" various other provisions are to be made. Some of these connected provisions have already found their places in the clauses of the Bill, but two of them—those relating to the expenses of speakers and the application of the funds of political organisations respectively—have yet to be inserted. With regard to the alternative vote, the rules are simple. Each elector is to have two votes, a "first preference" and an "alternative" vote. He may indicate the candidate who is his first choice and give him his preference vote by placing the figure 1 or the mark x opposite his name, and he may also place the figure 2 opposite the name of his

second choice and bestow on him his alternative vote. If a candidate receives an absolute majority of first preference votes he will be declared elected. If there is no such absolute majority, the candidate with the smallest number of first preference votes will be "excluded" and the alternative votes on the ballot papers counted to him will be transferred as first preference votes to those for whom they were cast. If there is still no absolute majority the process will be repeated and another candidate will be excluded. An alternative vote, after it has been transferred, is to be of the same value as a first preference vote, except that, if two candidates, one of whom has to be excluded, have an equal number of votes, the candidate who has the largest number of transferred votes will have to give place. -- *L.T.*, 1931, p. 70.

Proportional Representation.—The second of the rival schemes, Proportional Representation, endeavours to provide representation for the majority and for all substantial minorities in proportion to their strength throughout a country. The scheme naturally requires for its operation large electoral areas each returning a number of members, and in each such constituency the method of voting is the "single transferable vote." Each elector places the figure 1 against his first choice, 2 against his second, 3 against his third, and so on, but only one of his votes is effective. Suppose in a constituency returning five members there are 100,000 voters who record their votes. If a candidate obtains 20,000 first choice votes he can be sure of a seat, for not more than four candidates can each obtain as many as 20,000 first choice votes out of the balance of 80,000, and five candidates have to be elected. If in the above case five of the candidates each obtains 20,000 first choice votes, none of such votes being cast for any other candidates, perfect proportionate representation would be secured. But in all probability some candidates will obtain considerably more than the *quota* and some considerably less, and a process of transfer will in that case be required. The returning officer sorts the whole of the ballot papers of the leading candidate according to the names marked 2 thereon, and the votes such candidate does not require are divided among the second-choice candidates on his ballot papers in proportion to the number of 2's against the name of each on the whole of such papers. When all surplus votes have been thus transferred those candidates who have the lowest number of

votes are one by one excluded and their votes transferred until only the due number of candidates remain. They are declared elected, and, roughly speaking, proportionate representation is secured for all the really substantial parties engaged in the struggle.—*L.T.*, 1931, p. 70.

The German Civil Code.—This code, from which Mr. Goodhart declares, in his new volume of Essays in Jurisprudence and the Common Law, that sooner or later England will have to borrow the principle laid down in section 226, namely, that the exercise of a right which can have no purpose except the infliction of injury on another is unlawful, has now been in operation for thirty years and has been a great success. Like the Code Napoleon, it was called into existence in order to unify the law which till its promulgation varied in material respects in different parts of the Empire. "Broadly speaking," wrote Dr. Schuster in 1896, "it may be stated that out of a population of 42,500,000, 18,000,000 are governed by the Prussian Code, 14,000,000 by the German common law, which remains the modernised law of Justinian, 7,500,000 by French law, 2,500,000 by Saxon law, and 500,000 by Scandinavian law. There are therefore six general systems of law, but only two out of these are exclusive systems; the other systems are broken into by-laws and customs." Little wonder, therefore, that there was a real demand for one uniform system of law applicable through the whole empire. The same necessity for a code has not been felt in this country where local differences in customs have been few, at all events in modern times, although there may in the opinion of some be good grounds for a codification of English law for other reasons.

The German code was a long time in process of incubation. In 1848, a beginning was made by the enactment of a general law of bills of exchange; other portions of the law were from time to time codified, but it was not till 1874 that a commission was appointed to prepare a draft Civil Code, and it was not till 1887 that the commission submitted the result of its deliberations. Its draft continued a draft, and in 1891 another commission was appointed to reconsider the subject. This second commission was more expeditious, for it completed its work by June, 1895. On the basis of its draft a third was prepared by the Federal Council and submitted to the Reichstag in 1896, and after some amendment was passed into law, coming into operation on the 1st January, 1900. It was, as

one writer put it, the pressure of practical needs that gave the impulse to codification both in France and Germany, as well as in British India.—*L.T.*, 1931, p. 80.

BOOK REVIEWS.

THE LAW OF EVIDENCE APPLICABLE TO BRITISH INDIA, Ninth Edition, by Sir John Woodroffe and Ameer Ali, 1931. Price Rs. 28.

The treatise which has been looked upon as the leading commentary on the Indian Evidence Act almost since its appearance needs no introduction to the lawyer or the student. The main features of the work are already familiar and we have therefore only to notice that Sir John Woodroffe has brought it up to date by bringing out the ninth edition. As is well known, Woodroffe and Ameer Ali's Law of Evidence has met the wants both of the students of law and the members of the profession by reason of its valuable introductions and learned commentaries. The absence of over-citation in the body of the work of cases which according to the learned author were reported more with a view "to find grist for the mills of the numerous Indian journals" than by reason of the points laid down by them calling for their being reported, does not by any means detract from the merit of the book. It may perhaps be not out of place to mention that occasionally the latest legislative changes are not noticed as at page 552 where the learned author has not noticed the effect of the amendment by Act XXXVII of 1926 by which after the 1st of January, 1927, *all* wills and codicils made by any Hindu, Buddhist, Sikh or Jain have to be executed in conformity with the provisions of section 63 of the Succession Act of 1925 and not merely those referred to by the learned author oftentimes, it is a familiar criticism that there are misprints in Indian publications which are believed to be absent in English legal publications. We should expect such leading legal text-books like the one under review to be free from misprints, though the author can hardly be blamed for them. We regret to find that the volume under review is not altogether free from them. For instance at page 711 we find more than one reference being made to the points laid down in *Ram* v. *Mahomed*, 23 C. 227; we are unable to trace the case in the reports either by reference to its name or page. Such mistakes are perhaps inevitable in a huge work of this kind. We have every reason to believe that this edition of the book will command the respect and enjoy the popularity of its preceding editions.

THE INDIAN CONTRACT ACT, by Anukul Chandra Moitra, M.A., B.L., 1921. Price Rs. 7-8-0.

This is a commentary on the Indian Contract Act conceived in a perhaps novel plan. The learned author has given references to only Indian cases and omitted references to English cases as it is now nearly 59 years since the passing of the Act and most of the English cases have been followed in the Indian decisions. While we are inclined to agree with the learned author that most of the English cases of importance have been followed by the Indian Courts, it is difficult to believe that the Judges here have been able to command that legal style in laying down the principles of law which the great masters of the English law have wielded. It would therefore not have been superfluous to have stated the principles in the language of the English jurists and Judges themselves if especially we remember that the Act itself is only an amending and not a consolidating enactment and professes to give only some of the leading principles of the general law of contracts in the course of 75 sections and we have to turn almost at every step to English law. In some instances the references given to the English cases give one the impression that the learned author has not looked into the reports themselves. For example *Leslie* v. *Sheill* is referred to at pages 43 and 44 of the book as 3 K.B. 607 while as a matter it is (1914) 3 K.B. 607. There is a similar instance at page 257 of the case of *Lawford* v. *Billericay Rural District Council* which is referred to as reported in 1 K.B. 772 while it is reported in (1903) 1 K.B. 772. There are similar instances in other places in the book, *e.g.*, at pp. 199 and 563. The learned author has given the Sale of Goods Act, the Usurious Loans Act and the Interest Act with annotations thereon.

MADRAS DISTRICT MUNICIPALITIES ACT, by A. S. Sreenivasa Aiyar. Published by the Law Publishing Co., Mylapore. Price Rs. 3.

The book sets out the Act of 1920 with the amendments of 1930. Select cases decided under the Act are referred to in the notes under the corresponding sections, and the appendices contain the Statement of Objects and Reasons and the Report of the Select Committee. The printing and the get up are neat and the book will be found useful for purposes of ready reference to those who wish to acquaint themselves with the provisions of the Act.

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FATHER'S ALIENATIONS AND AFTER-BORN SONS.

Certain broad expressions of Lord Blanesburgh in *Lal Bahadur* v. *Ambika Prasad*[1] lend themselves to the view that the familiar law on the matter has been overturned (*see* 50 M.L.J. (N.I.C.), pages 3 and 4). And it is well, therefore, to take stock of the law, if we are to re-assure ourselves that there has been no such overthrow or revolution. Some day, the Judicial Committee themselves may give us that re-assurance (in whole or in part), as they did in *Brij Narain's case*[2] with respect to Lord Shaw's judgment in *Sahu Ram's case.*[2a]

Now, the first step to take, is to consult the statement of the law as made by text-writers of eminence; and the next step would be to consult the pronouncements of the Supreme Tribunal.

Mr. Mayne and his editor Sir Murray Coutts-Trotter state the law in precisely the same way as does Sir D. F. Mulla. For simplicity's sake, the following citation is made from Sir Mulla's book: The only preliminary observation that need be made is that a son born subsequent to the date of the alienation in question but conceived prior to that date, ranks as a 'prior-born' son, but the burden of proving that the son was born or conceived before the date of the alienation in question, is clearly on the person pleading such prior birth or conception. (*Sabapathi* v. *Somasundaram*[3] and *Venkata Subba Raju Garu* v. *Gatham Venkatrayudu.*[4])

1 (1925) L.R. 52 I.A 443. I L.R. 47 A 795 (P C)
2 (1923) L R. 51 I.A. 129. I.L.R. 46 A 95 46 M.L.J 23 (P C)
2a (1917) L.R. 44 I A. 126 I.L.R. 39 A. 437· 33 M.L.J 14 (P.C.)
3 (1882) I.L.R. 16 M 76 2 M.L.J. 244. 4. (1914) 27 M.L J 580

Says Sir Mulla: "An alienation made by a father, there being no male issue in existence at the date of the alienation, is valid, though made without legal necessity. . . But an alienation made by a father who has sons then living, without legal necessity, is invalid, if made without their consent. Such an alienation may be set aside not only at the instance of those sons, but at the instance of any son born after the date of alienation, unless it has been ratified by them *before* his birth." (*See* Mulla's Hindu Law, 6th Ed., p. 308.) The cases quoted by Sir Mulla in support of the above proposition are: *Hurodoot* v. *Beer Narain*,[5] *Tulshi Ram* v. *Babu*,[6] *Bhup Kunwar* v. *Balbir Sahai*[7] and *Dwarka Das* v. *Krishan Kishore*.[8] (See also *Hasarimal Babu* v. *Abani Nath*[9] and 45 M.L.J. (N.I.C.), page 17.) If the son in existence at the date of the sale was a minor at the time, he could not consent to the sale and the father could not be held to have consented on behalf of the son. Thus the sale would rank as one made without the son's consent. (*Bhup Kunwar* v. *Balbir Sahai*[7] and *Subbarami Reddi* v. *Ramamma*.[10])

Next, we may consider three decisions of the Privy Council relevant to the question on hand. The birth of the after-born son does not create a fresh cause of action or a new starting point of limitation for setting aside the father's improper alienation. *Ranodip Singh* v. *Parmeshwar Prasad*.[11] Equally clearly, the after-born son is entitled to an equal share in any joint family estate that may be recovered by his prior-born brother consequent on proceedings impeaching the father's alienations: *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*[12]; *Venkata Row* v. *Tuljaram Row*[13] on appeal from *Ganesh Row* v. *Tuljaram Row*.[14] (*See* Mayne, para. 287, as to the recovery of ancestral property from despoilers not claiming under the family.)

The circumstance that in the case last cited the Board (differing from the High Court) found that the father's alienation was not binding even on his own share, and accordingly directed that the shares of the members should be fixed as at the date of the dissolution of the joint family, only makes the case similar to a case under the Mitakshara law as interpreted in Bengal and the United Provinces, or to a case of gift of co-

5 (1869) 11 W.R. 480. 6. (1911) I.L.R. 33 A 654
7 (1921) I.L.R. 44 A. 190.
8. (1921) I.L.R. 2 Lah 114 at 119, 120
9 (1912) 17 Cal L.J. 38 10 (1920) I.L.R. 43 M 824.
11. (1924) L.R. 52 I.A. 69. I.L.R. 47 A 165. 48 M L.J. 29 (P C).
12. (1913) L.R. 40 I.A. 213: I.L.R. 40 C 966 25 M.L.J 512 (P C).
13. (1921) L.R. 49 I.A. 91: I.L.R. 45 M. 298 43 M.L.J 298 (P C).
14. (1913) 26 M.L.J. 460 at 463, 466, 467.

parcenary property which (with limited exceptions) is void *in toto* according to the Mitakshara law all over India. If the alienation were found to be binding on the father's share, it would of course bind his share as on the date of the alienation. (*Chinnu Pillai* v. *Kalimuthu Chetti*[14]) And if the father were to become the sole survivor of the joint family, the equitable doctrine of "feeding the estoppel" (embodied in S. 43 of the Transfer of Property Act) might operate in favour of the alienee for value (*Venkata Row* v. *Tuljaram Row*[15]). The birth of a son subsequent to that point of time might not prejudice the alienee.

The following language of the Board is most helpful to the present discussion. They say: "Two further sons were born to Rajaram Row before the case came on for hearing on remand; and as they were also members of the joint family with their father and the plaintiff, they were added as defendants and are the 3rd and 4th respondents on these appeals. . . . At the present time the joint family continues; the joint family finds that this is a portion of the joint family estate which has been improperly alienated, and *which they are entitled to recover.*" The joint family comprising the after-born sons are entitled to recover the estate improperly alienated; and the suit brought by the prior-born son is not for his personal benefit, but it is to remove a common injury to the family estate.

The law relating to suits by reversioners furnishes a useful analogy The Privy Council have laid down that under O. 1, R. 1, Civil Procedure Code, the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. As a general rule, such suits must be brought by the presumptive reversioner; but, under certain circumstances, the next presumable reversioner would be entitled to sue. There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff, or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioner to sue: *Venkatanarayana Pillai* v *Subbammal.*[16]

If an after-born remote reversioner (by his next friend) can be accorded a right of suit, an after-born son ought not to

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13 (1921) L.R 49 I.A 91: I.L.R. 45 M 298· 43 M.L.J. 298 (P C.)
15 (1911) I.L R 35 M 47: 21 M L J. 246 (F.B).
16 (1915) L R, 42 I,A. 125: I.L R. 38 M 406 28 M.L.J. 535 (P C)

be denied such a right. In both cases, the cause of action is the common injury to the estate; and the "after-birth" furnishes no new cause of action and no new starting point of limitation.

As to the possibility of ratification by the son, it may be asked, why should his consent be less effective after the birth of another son? The reason presumably is that on his birth the after-born son acquires a vested interest in the family estate and in the right to avoid improper alienations. Some analogy may be found in section 200 of the Contract Act which runs thus: "An act done by one person on behalf of another, without such other person's authority, which if done with authority, would have the effect of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect." By omission to impeach the father's alienation within the statutory period, both the sons might lose together the alienated property; but beyond that, the after-born son shall not suffer by reason of any positive consent given subsequent to his birth, though such consent might bind the share of the consentor and might even be presumptive, though rebuttable, evidence of the reasonableness and propriety of the father's alienation.

Now as to Lord Blanesburgh's judgment in *Lal Bahadur* v. *Ambika Prasad*[1] In that case, the impeached sale was made by the grandfather and the grand-uncle of the plaintiffs (respondents) in order chiefly to discharge two "antecedent mortgage debts" incurred by the alienors so early as 1895, when plaintiffs' father was but 13 years old, their uncle was but 3 years old, and they themselves were still unborn. The plaintiffs' father was alive when the suit was brought in 1919 The Board found that "all the circumstances in connection with the (disputed) sale were throughout known to the father and the uncle of the respondents, who neither of them at any time, although now supporting the respondents in these proceedings, themselves took any steps to impeach the sale on any ground." On those facts, the Board dismissed the action of the plaintiffs; and neither Mayne, para. 342, nor any one of the group of cases of which *Tulshi Ram* v. *Babu*[6] is a type, was cited before the Board.

The following expressions in the judgment of Lord Blanesburgh arrest attention: "In 1895 plaintiffs were still unborn. It follows from it that these two mortgage deeds have always been binding on the respondents. The only joint family estate to

1. (1925) L R 52 I.A 443· I.L.R. 47 A 795 (P C).
6. (1911) I.L.R. 33 A. 654.

an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated . . . . Was the sale-deed of 1904 binding on the respondents as having been made for the benefit of the family and for payment of antecedent debts? Was it any the less binding upon them even if the mortgages were not antecedent debts, seeing that these mortgages were both of them unchallengeable by the respondents? . . . The effect of the case of *Brij Narain* v. *Mangal Prasad*[2] is to show that in the circumstances of this case both of the mortgages of 1895 were 'antecedent debts' which would justify for their liquidation a sale of family property not otherwise improper. *In the present case, however, it is not, in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. Both mortgages, as their Lordships observe once more, were binding upon the respondents. A sale of family property otherwise unobjectionable, which resulted in the removal from what remained of it of the burden* pro tanto *of these encumbrances, cannot be successfully attacked by those so bound. It follows that, in their Lordships' judgment, the sale in question is valid as against the respondents.*" In the same strain are the words "If the respondent Adita Prasad was not born at the date of the sale-deed, that deed is binding upon him, and the suit impeaching it, so far as he is concerned, cannot be maintained."

Can it be, that by the above expressions, the Board have virtually repealed a course of decisions which were not cited before them, which extend over 60 years, and which have been treated by eminent text-writers as sound and settled law. (*Cf.* the comments in *Arumugham Chetti* v. *Muthu Koundan*[17] on *Sahu Ram's case*, and the comments in 43 M.L.J. (N.I.C.), p. 7 on *Venkata Row's case*.) No doubt, in *Ranodip Singh* v. *Parmeshwar Prasad*[11] the Privy Council have held that an after-born son is not entitled to the extended period provided for by sections 6, 7 and 8 of the Limitation Act; and that is because, by the express terms of the sections, this extended period can only be claimed by a person entitled to institute the suit *at the time from which* the period of limitation is to be reckoned. But in *Lal Bahadur* v. *Ambika Prasad*[1] do the Privy Council mean to go further and hold that the *only* sons that can question the father's alienation are those in existence at the time of the

1. (1925) L.R. 52 I.A. 443: I.L.R. 47 A 795 (P.C.).
2. (1923) L.R. 51 I.A. 129: I.L.R. 46 A 95: 46 M.L.J. 23 (P.C.)
11 (1924) L.R. 52 I.A. 69: I.L.R. 47 A. 165: 48 M.L.J. 29 (P.C.)
17 (1919) I.L.R. 42 M, 711: 37 M.L.J. 166 (F.B.).

alienation, and that if they do not choose to question, no after-born son can?

In any case, the judgment cannot be deemed to have negatived the right of the after-born son to make common cause with his prior-born brothers, and along with them to bring or defend suits concerning their father's improper alienations; and his right to an equal share in any relief or compensation that may be obtained by his prior-born brothers in respect of such improper alienations,—that right also cannot be deemed to have been negatived by Lord Blanesburgh. Those rights have been guaranteed to the after-born son by the decisions of the Judicial Committee in *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*[12] and *Venkata Row* v. *Tuljaram Row*.[13]

K.C.G.

CRITICAL NOTE *

ON

RAGHO *v.* ZAGA EKOBA, (1928) I.L.R. 53 B. 419: 31 Bom. L.R. 364.

To the lawyers of civil litigation the question of validity of disposition of property by a manager of an infant member of the family or a Hindu widow or the shebait of a temple or a trustee for necessity or benefit of the estate, is always one of high importance, and there is not an year or a month when the Law Reports and journals of India do not publish one or the other case of the kind, with reference to Hindu Law. Ever since July, 1856, when the well-known case of *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonveree*[1] was decided by the Privy Council down to this day, numerous judgments have been delivered on the point by various Benches of the High Courts in India, either following or distinguishing or dissenting from each other. The Privy Council has had its share, though it has been consistently adopting its own view laid down in *Hunoomanpersaud Panday's case*,[1] but in spite of this, the uncertainty of law continues to this day. The case under notice is an illustration of it.

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12. (1913) L.R. 40 I.A. 213: I.L.R 40 C 966: 25 M.L.J. 512 (P.C)
13. (1921) L.R. 49 I.A. 91 I L R. 45 M 298: 43 M L.J. 298 (P C)

*By Mr Rochaldas Karamchand, Pleader, Sukkur

1. (1856) 6 M.I.A. 393.

Their Lordships of the Privy Council were perfectly justified in avoiding to give a precise definition to the expressions "necessity" and "benefit of the estate" and also in characterising them as general and elastic terms and in allowing Courts to remain free to judge of their nature, according as circumstances required.

In *Ragho* v. *Zaga*[2] the Division Bench of the Bombay High Court constituted by Justices Patkar and Murphy have held that the benefit of the estate for supporting an alienation must be of a protective character. The necessity, they were of opinion, involves some notion of pressure from without, and they also held that the benefit to the estate would not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return and would not imply vast powers of management which amount to an authorization to embark on speculative ventures.

While holding so, the learned Judges have discussed various authorities and Hindu texts (*Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonveree*,[1] *Palaniappa Chetty* v. *Sreemath Devasikhamani*[3] relied on, *Ganap* v. *Subbi*[4] and *Shankar Sahai* v. *Bechu Ram*[5] followed, *Nagindas* v. *Mahomed Yusuf*[6] distinguished, *Jagmohan Agrahri* v. *Prag Ahir*[7] and *Jado Singh* v. *Nathu Singh*,[8] dissented from) and referred to several others.

With due deference to the learned Judges of the Bombay High Court, it is submitted, the view propounded by them is erroneous, and not supported by the very Privy Council decisions on which they have relied the most. It would not be wrong to say that the pronouncements of their Lordships of the Privy Council have been misread by them. And the case of *Shankar Sahai* v. *Bechu Ram*,[5] which they were pleased to follow, was no good law then, it having been overruled by *Jagat Narain* v. *Mathura Prasad*[9] quite six months before the date of the delivery of their judgment.

I shall now proceed to discuss the various rulings quoted above and a few more relevant to the point herebelow, and make an humble venture to show that the above decision is not sustainable in law and facts. In order to appreciate this, it is

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1 (1856) 6 M.I.A. 393 at 423.
2. (1928) I L.R. 53 B. 419.
3. (1917) L.R. 44 I A. 147: I.L.R 40 M 709 : 33 M L J. 1 (P C).
4. (1908) I.L.R. 32 B. 577.
5. (1925) I.L.R. 47 A. 381.
6 (1921) I.L.R 46 B. 312.
7. (1925) I.L.R. 47 A. 452
8. (1926) I.L.R. 48 A. 592.
9 (1928) I.L.R. 50 A. 969 (F.B.).

very necessary to state the facts of the case under notice in some detail.

In the village of Shelave in the Parola Taluka, District Khandesh, there lived a joint family of a father and a minor son. The latter inherited the property in suit from his mother, who had in her turn inherited it from her own mother. His father was managing it—the land could not be farmed directly and being in possession of persons, who had no permanent interest in it, it was let to strangers at the low rental of Rs. 40 per annum. The minor and his father lived at Datana in Shindhkot Taluka *about thirty miles* away from Shelave. The boy's father finding it inconvenient to manage the property, sold it away for Rs. 1,500 along with one house of his own for Rs. 500 on 22nd November, 1918, and purchased from the sale proceeds thereof, Rs. 2,000, another land at Datana, measuring 13 acres, which yielded to them an annual income of Rs. 225. No sale-deed was passed by the purchaser but its possession was actually transferred to the minor's father.

The minor brought this suit in November, 1923, for a declaration that the sale-deed of 22nd November, 1918, was not binding on him, and for possession and mesne profits. Both the Lower Courts held that the sale in favour of defendant 1 by the plaintiff's father was for the benefit of the minor and binding on him on the ground that, the plaint land, situated inconveniently to them, as it was, was not yielding an income of more than 40 rupees, and, on the other hand, by virtue of the arrangement referred to above, the income produced was Rs. 225, which brought to the minor alone, to his proportionate share, more than four times over, in addition to that allowed to him as being the son of the father. The second appeal was rejected summarily by Justice Percival, but when the matter came under Letters Patent, before Justices Patkar and Murphy, they reversed the findings of all the three Courts.

Now let me take up the case-law.

In the earliest case (*Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree*[1]) a mortgage was executed by a Ranee in her character of a guardian of her infant son and manager of his estate. The money borrowed was utilized in payment of the arrears of revenue due to the Government in respect of these estates, and the property saved from sequestration. On the alienation being impeached, in the Privy Council, Lord Justice

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1. (1856) 6 M.I.A. 393.

Bruce thought it right to state certain general principles for future guidance and observed as hereunder (*vide* page 423 of the report):

"The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power It can only be exercised in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

At page 424 the Lord Justice continues and remarks:

"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance, for the benefit of the estate But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money"

The passages quoted above have been referred to, and relied upon in numerous judgments and it is indubitably the source of the law on the point. Here we have a clear and an unambiguous direction to the effect that the power to charge an estate can arise "in case of need" *or* "for the benefit of the estate" and it also arises when the charge is one that a prudent owner would make in order to benefit the estate, and the elements to be considered are—

"The actual pressure on the estate, the danger to be averted *or* the benefit to be conferred on it in the particular instance."

The disjunctive letter "*or*" is being italicised with a view to show that the benefit to the estate would by itself be a justification for creating a charge. Nowhere is there a limitation prescribed by the highest Tribunal that there need be necessarily an element of "danger to be averted." Therefore the restricted view that the transaction "must necessarily be of defensive character" cannot stand. *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonveree*[1] has been reiterated by the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lal*[10] which holds that the same principles apply to the case of sales.

The next case of importance on the point is that of *Palaniappa Chetty* v. *Sreemath Deivasikhamani*[3] decided by the Privy Council in about 1917. In that case the shebait of a temple had disposed of the temple property of a stable and safer nature

1 (1856) 6 M.I.A. 393

3. (1917) L.R. 44 I A. 147 I.L.R. 40 M. 709: 33 M.L.J. 1 (P.C.).

10. (1874) L.R. 1 I.A. 321.

with a view to getting capital to embark in the money-lending business (I.L.R. 40 M. 719) and it was not established that there was any necessity for the grant or that benefit accrued to the charity estate. Under those circumstances their Lordships set aside the alienation and observed:

"It is impossible to give a precise definition of it (benefit to the estate) applicable to all cases, and they do not attempt to do so"

"The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions of it from injury or deterioration by inundation, these and such like things would obviously be benefits."

And later on their Lordships remarked:

"The difficulty is to draw the line as to what are in this connection to be taken as benefits and what not."

These apparently are the observations from which the theory of the Bombay High Court Judges originates, and on which they mainly rely in arriving at the conclusion shown above.

It is submitted, the illustrations given above are not, in the first place, exhaustive, and the very use of the word 'obviously' by their Lordships of the Privy Council just before the instances quoted above, is not an indication of the idea that they were the only ones that justified an alienation.

The learned Judges have fully followed *Ganap* v. *Subbi*,[4] their dictum being exactly the same as in *Ragho* v. *Zaga*,[2] any comment therefore on it would be superfluous.

And the next case followed in the case was *Shankar Sahai* v. *Bechu Ram*.[5] It was a suit to set aside the alienation of property which was effected by the manager with a view to secure money to meet the pre-emption case, and the Allahabad High Court refused to confirm the sale on the ground that there was no necessity nor was the said alienation for a purpose of defensive character, which alone could, in the view of the Judges presiding, be a justifying cause for transfer of property by the manager. It is strange that this ruling was referred to with approval by Justice Patkar though it was no good law then, it having been already overruled authoritatively by the Full Bench of the same High Court in *Jagat Narain* v. *Mathura Prasad*.[9]

The most relevant of the cases quoted and discussed in the case under notice were *Jagmohan Agrahri* v. *Prag Ahir*[7] and *Jado Singh* v. *Nathu Singh*.[8] The facts of both were on all fours

2. (1928) I.L.R. 53 B. 419.
4. (1908) I.L.R. 32 B. 577.
5. (1925) I.L.R. 47 A. 381.
7. (1925) I.L.R. 47 A 452.
8. (1926) I.L.R. 48 A. 592.
9. (1928) I.L.R. 50 A. 969 (F.B.).

with the present case. In *Jagmohan Agrahri* v. *Prag Ahir*[7] the father of a joint Hindu family sold a portion of the family property which was inconveniently situated and was not sufficiently profitable and employed the proceeds in extension of the family business which was not of a speculative nature, it was held that the transaction was legitimate and could not be upset by the sons. And in *Jado Singh* v. *Nathu Singh*[8] it was held that the term "benefit to the estate" may be held to apply to such a transaction as the sale of an *inconveniently situated*, incumbered and unprofitable property and the purchase in its stead, of the property which was undeniably a sound investment. But the Bombay High Court has dissented from both those rulings.

Then comes the Full Bench decision of the Allahabad High Court reported in *Jagat Narain* v. *Mathura Prasad*.[9] Their Lordships Justices Boys, Kendall and King after discussing all the previous rulings of its own High Court—for and against—and of the Privy Council referred above, and a few others, unanimously came to hold that in order to sustain an alienation of joint family property made by the managing member of the family, the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available at the time.

They were further pleased to hold that the transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are "of a defensive nature." *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonveree*[1] and *Palaniappa Chetty* v. *Sreemath Deivasikhamani*[3] were relied upon and *Shankar Sahai* v. *Bechu Ram*,[5] among others, overruled.

(This judgment was dated six months earlier than the date of delivery of *Ragho* v. *Zaga*.[2])

The Madras High Court too has adopted exactly the same view in the case of *Mahalakshmamma* v. *Ramaswami*.[11] Here the plaintiff sued to set aside the alienation of her immoveable property made by her mother which originally belonged to her deceased father. In the trial it came out that the land in question was sold because it was situated far away from *Kollur*, which was the plaintiff's mother's residence in order to buy better land in *Kollur*

1 (1856) 6 M.I.A. 393 2 (1928) I.L.R. 53 B 419
3. (1917) L.R. 44 I.A. 147: I.L.R. 40 M 709: 33 M.L.J. 1 (P C).
5 (1925) I.L.R. 47 A. 381 7. (1925) I.L.R. 47 A 452
8 (1926) I.L.R. 48 A 592. 9 (1928) I.L.R. 50 A. 969 (F.B.)
11. (1926) 50 M L J. 651.

itself. Both the District Judge and Munsif found that the sale was valid and binding on the plaintiff because the lands sold were situated in an out-of-the-way village and yielded very little and because the object of the sale was, with the aid of the sale proceeds and some other money contributed by the plaintiff's mother, to purchase better land which was more convenient for cultivation. The High Court in appeal refused to set aside the alienation and held that if it is found that the estate has been improved by selling immoveable property and buying other lands of equal or greater value and more convenient for cultivation and management, the Courts will not set aside such alienation.

Though the facts in *Nagindas* v. *Mahomed Yusuf*[6] are not very opposite to those of the one under discussion, it is worthy of note that Justice Shah, after fully discussing the Hindu texts, has come to hold that the term "necessity" must not be strictly construed and the benefit to the family may under certain circumstances mean a necessity for the transaction.

Having discussed the above rulings, it is respectfully submitted that the decision of the Bombay High Court does not get support from the Privy Council ruling relied upon by it and *Shankar Sahai* v. *Bechu Ram*[5] followed by the learned Judges is no more good law in the face of the Full Bench decision in *Jagat Narain* v. *Mathura Prasad*[9] and the Madras High Court too has dissented from it in *Mahalakshmamma* v. *Ramaswami*.[11]

Now let me go further, and offer a few remarks on some other grounds put forth in the judgment in support of the decision under comment.

Justice Patkar, after handling the legal aspect of the case, came to decide that the transaction in suit was not for the benefit of the minor but was detrimental to his interests though the trial Judge, the first and the second appellate Courts had recorded findings contrary to it. The reasons that influenced his Lordship to come to that conclusion were, that the property sold was the minor's grandmother's property and thus otherwise immune from liability of any possible attachment against the father, that no sale-deed was secured from the vendor and a portion of the purchase money of the substituted lands remained yet to be paid, that complications might at any time arise to the minor later on, that *therefore* there was no necessity or benefit to the estate.

5 (1925) I.L.R. 47 A 381
6 (1921) I L.R. 46 B. 312.
9 (1928) I.L.R. 50 A 969 (F.B.)
11 (1926) 50 M.L.J. 651.

Justice Murphy having put forth the facts and various considerations in favour of the alienation in suit most fairly and feeling the force of the argument and circumstances pressing on him, ultimately concurred with his learned brother remarking that "the argument is plausible, but I think all is not as fair as it sounds."

It is strange indeed that Justice Murphy should have failed to consider that the minor, as a matter of fact, had been greatly benefited by the transaction entered into on his behalf, in so far that better and more convenient lands were secured to him and that the yield of income to his share alone—from the mother's side—had enhanced more than fourfold, that he had actually enjoyed the benefit for full five years, that his guardian or manager or trustee, with whatsoever name he may be called, had exercised his discretion as any prudent owner would do, and that the purchaser had *bona fide* entered into the transaction and paid full consideration thereof, and that if there was any possible complication to arise therefrom to the minor, it was easily remediable by ordering actual partition of the property in this or another suit, and by getting entries made in the Record of Rights according to the shares of the father and son and thus guaranteeing the minor's position. But the learned Judge *thinks* that the transaction could not be maintained.

It is most noticeable that Mr. Justice Murphy was pleased to observe at the end of his judgment (vide *Ragho* v. *Zaga*[2] at p. 431) that

> "It is obvious on the one hand that one of the limits must be transactions of a speculative character, such as might possibly turn out profitably, but contain an appreciable element of risk. On the other hand, where there is a margin of income allowing of an improvement in the estate by the use of some of the surplus together with what might be raised by the sale of a small portion for the purpose of acquiring more property and extending the estate, a sale might possibly be justified,"

and simultaneously to issue a warning to the effect that

> "I am not laying down a rule but merely indicating circumstances which might justify the sale of a minor's estate by the guardian of his property"

One cannot understand the feasibility of such safeguards when there was not the least indication of speculative nature in the transaction in suit.

And lastly, it is very strange that both the learned Judges should have thought fit even not to allow just equities to the *bona fide* purchaser-respondent in the case.

See also the note in 58 M.L.J. (N.I.C.) 6.

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2 (1928) I.L.R. 53 B. 419.

SUMMARY OF ENGLISH CASES.

SWADLING *v.* COOPER, (1931) A.C. 1.

Negligence—Contributory negligence—What is—Motor collision on road—Nature of direction to jury.

The defendant was driving his car at 30 or 35 miles per hour along a main road. The deceased was proceeding on a motor cycle along a road which crossed the main road at right angles and the car and the cycle came into collision at the cross roads. The defendant gave due warning of his approach to the cross roads but the deceased did not appear to have given any warning. The distance from the defendant's car when he first became aware of the presence of the deceased to the spot of the collision was not more than 11 yards. The trial Judge sufficiently explained the law to the jury and asked them to find out "whose negligence was it that substantially caused the injury". The Court of Appeal ordered a new trial on the ground that the jury should have been told in plain terms "If you think the plaintiff was negligent but that the defendant, after the plaintiff was negligent, by taking reasonable care could have avoided him, such negligence of the plaintiff is not, as a matter of law, negligence which contributes to the accident so as to prevent the plaintiff from recovering."

Held, by the House of Lords, that a full discussion of the cases would be inappropriate in a summing up and would inevitably tend to confuse and bewilder the jury. In a summing up it is essential that the law should be correctly and fully stated. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine. The utmost limit of time between the moment when the defendant could have become aware of the deceased's approach and the moment of the impact was not more than one second. The brakes were applied at once. The crucial question on these facts was that put by the Judge and which the jury answered. Both were negligent, the defendant in approaching the junction at too rapid a pace and the deceased in the way he came out into the road and from the moment the parties became aware of their respective positions there can have been no time for the defendant to do anything to avoid the impact and therefore the negligence of each contributed to the collision.

GIRLS' PUBLIC DAY SCHOOL TRUST, LIMITED *v.* EREAUT, (1931) A.C. 12.

Income-tax—Day school carried on by a company—School open to public and in several respects a public school—Provision for payment of dividend to preference shareholders—If removes it from the category of public school.

A limited company owned and ran a day school for girls for education on moderate terms of girls of all classes. It was at all material dates open to the general public and the company could not exclude any would-be pupil except with the approval of the Public Education Authority; a large proportion of its pupils were scholars from the public elementary schools; a great proportion of its governing body was nominated by the Local Education Authority. The sole object of the Council which carried on the school was to maintain the school at the highest level of efficiency and the education provided was recognised by the Local Education Authority as being what is commonly called a public school education. The school was largely maintained by public moneys and in the view of the Board of Education the school satisfied the regulation which prohibits any parliamentary grant to a school conducted for private profit. The memorandum of association of the company authorised the company to apply part of the profits in paying a dividend to its preference shareholders and the company had been paying them a dividend also. The Commissioners found that the school was a public school and exempt from income-tax.

Held, the fact that the company is authorised to and does in fact apply part of the profits which it earns in paying a dividend to its preference shareholders does not necessarily prevent the school from being a public school. It is only an element for consideration. It is a question of fact in each case for the Commissioners to find and there was sufficient evidence to support their finding. The terms on which and the circumstances in which education is given are the determining factors.

Blake v. *Mayor, etc., of City of London,* (1886-7) 18 Q.B.D. 437; 19 Q.B.D. 79 and *Dilworth* v. *Commissioner of Stamps,* (1899) A.C. 99, explained.

It is not of the essence of a public school that there must be a perpetual foundation. Existence of a perpetual foundation, ownership or management by a public body are all only factors to be considered in determining the question as a fact.

SCOTT *v.* SUMMERLEE IRON COMPANY, (1931) A.C. 37.

Workmen's Compensation Act—Miner's nystagmus—Workman leaving employment and re-entering—False represen-

tation as to immunity from nystagmus at the time of re-entry—Whether re-entry is "entering the employment" within S. 43, *sub-sec.* (1) (*b*).

A miner and brusher was disabled by miner's nystagmus in 1924 when he was in the employment of certain other coal-masters. He entered the service of the respondents in 1926 and after a short period left their service. He again re-entered their service in April, 1927. In May he went to another section of the colliery and on that occasion he made a declaration in writing falsely and wilfully that he had at no time suffered from nystagmus. He left the service temporarily again and rejoined in November, 1927, when he again made a similar false declaration. He then worked till April, 1928. He left service and re-entered in June, 1928. On September 1, 1928, he was certified as disabled from miner's nystagmus as from 26th August, 1928.

Under S. 43, sub-sec. (1) of the Workmen's Compensation Act, 1925, where a workman is certified to be suffering from an industrial disease due to the nature of the employment in which the workman was employed at any time within twelve months previous to the date of the disablement, he shall be entitled to a compensation subject to the following modification in cl. (*b*) that if the workman has at the time of "*entering the employment*" wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable The question was whether the workman entered the employment in April, 1927, when he made no false representation or in November, 1927, when he re-entered and made the representation or in June, 1928, when he re-entered and made no representation.

Held, that the employment was not a continuous employment because the gap from July, 1927 to August, 1927, a time during which the workman was neither in actual work nor in contractual relation with the respondents makes it impossible to hold so. Same reasoning for the other gaps also. The "employment" referred to in S. 43 (1) (*b*) are the employments within 12 months previous to the accident and not the last employment and the expression "entering the employment" refers to the entering of employment at any time within the 12 months and as in November, 1927, he made a false declaration, he was not entitled to recover.

OFFICIAL ASSIGNEE OF THE ESTATE OF CHEAH SOO TUAN *v.* KHOO SAW CHEOW, (1931) A.C. 67.

Bankruptcy—Straits Settlements Bankruptcy Ordinance, S. 50—Conveyance by bankrupt within two years of bankruptcy —Onus *of proving good faith and consideration.*

Section 50, sub-section (1) of Straits Settlements Ordinance No. 44 provides that "any settlement of property, not being . . . a settlement made in favour of a purchaser . . . in good faith and for valuable consideration, ... shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void as against the Official Assignee"; and by sub-section (3) " 'settlement' for the purposes of this section includes any conveyance or transfer of property . . . ."

Held, that the *onus* is on the Official Assignee to prove that a conveyance is not made in good faith and for valuable consideration. The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. But as the trial Judge has taken an erroneous view as to the law in regard to *onus* and his mind was coloured by that view, and he was thereby disabled from weighing evenly the evidence, a new trial was ordered.

N. R. M. N. RAMANATHAN CHETTY *v.* M. K. A. MEERA SAIBO MARIKAR, (1931) A.C. 77.

Ceylon—Roman-Dutch Law—Fiscal warrant—Wrongful seizure of goods—Liability to damages of person causing the seizure—Absence of malice.

The parties to the action were both of them creditors of a firm *N Company* carrying on business in tea in Colombo. The *N Company* filed a petition in insolvency in June, 1925. The respondent who had heard of the insolvency observed that a few days after insolvency tea was being removed from the Company's premises. The tea was being removed in pursuance of an agreement between the company and the appellant prior to insolvency whereby tea had been sold to him and in fact some tea was already removed and the remainder removed on the later date, so that the appellants were the owners of the tea in question. The respondent presented a petition to the Colombo District Court praying (amongst others) that the fiscal might be ordered to seize the goods specified in the petition at the respective places therein specified as having been deposited by the insolvent company and it referred to the appellant's store also. A search warrant was

issued and the fiscal executed it by entering the appellant's store and seizing the tea there, which was then not the property of the company but of the appellant. The respondent was the cause of the seizure. In an action for damages for wrongful seizure,

Held, that under the Roman-Dutch Law of Ceylon though the respondent acted in good faith and without malice, he was the cause of the appellant's property being wrongfully seized and that rendered him liable to damages. A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorised the seizure, the seizure is lawful and malice has to be proved. If, however, the writ or warrant did not authorise the seizure of the goods seized, action would lie without proof of malice.

YOUNG *v.* CANADIAN NORTHERN RAILWAY CO., (1931) A.C. 83.

Contract—Contract of employment—Wrongful dismissal of employee—Contract between parties silent—Agreement between employer and a labour organisation regulating right of dismissal—Employer observing those rules even with regard to plaintiff—If become part of the contract.

The plaintiff was engaged by a Railway Company as a machinist and all that passed when he was engaged was this. He saw *H* and signed an application for employment and *H* stated that he (plaintiff) would receive the going rate, the machinist's rate. The contractual obligation to observe seniority and not to dismiss him while retaining his juniors in service was not suggested from this but from the facts that (*i*) the company treated all employees alike, (*ii*) that as regards salary he was placed under "schedule" which meant the wage Agreement No. 4 (which was an agreement with a labour organisation which regulated the company's rights of dismissal), (*iii*) that he was placed on the seniority list, (*iv*) that in accordance with the agreement they gave him notice of dismissal, and (*v*) his complaint was referred to a committee in accordance therewith. The complaint was that he was dismissed in violation of those provisions and that therefore he was entitled to damages.

Held, that these matters cannot be treated as establishing contractual liability by the Railway Company to the plaintiff. The fact that the Railway Company applied the agreement to

him is equally consistent with the view that it did so, not because it was bound contractually to apply it to him, but because as a matter of policy it deemed it expedient to apply it at all. Also even the wage agreement is not adapted for incorporation with a service agreement but a contract between the labour organisation and the company. If the employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by the organisation against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied.

LOCK *v.* BELL, (1931) 1 Ch. 35.

Contract—Contract for sale of plaintiff's interest in licensed premises—Time for payment of purchase money and delivery of possession on or about particular date—Earnest money paid—Forfeiture of, if vendee failed to perform in time—Time, if of the essence of the contract—Fixed sum of 200l. as damages—If a penalty.

By a contract, dated 19th October, 1928, between *L*, the licensee of a public house known as Thorns, and the defendant, *L* agreed to sell to him all her interest in the house for 1,200*l.* of which 120*l.* was to be paid into the hands of vendor's agents as stakeholders and the balance to be paid and possession was taken "on or about November 10, 1928." The said 120*l.* was to be earnest money which was to be forfeited in part of the ascertained damages of 200*l.* fixed in case of breach by either side. The sale was subject to acceptance of the defendant as tenant by the freehold brewers of the house. The freehold brewers consented to the sale and on the date of the sale nothing remained to be done save to pay the purchase price and take delivery of the premises. The defendant expected to sell some property of his and raise the money but at least a week before November 10th he knew that he would not find the money unless he could borrow it, as the negotiations for his sale had fallen through. The plaintiff extended the time for completion to December 8th. The plaintiff was ready to complete but even by that date the defendant failed to complete. In an action to recover the balance of 80*l.* damages,

Held, that December 8th was fixed as the result of a concession by the plaintiff to the defendant and with the defendant's consent, and that the defendant agreed to complete the purchase on that date. The contract is for the sale of the interest in a

public house which was being carried on by a widow who was exceedingly anxious to get rid of it, and the contract involves, of course, a transfer of the business as a going concern, the business being one which depends largely on the powers of management of the licensee. Stock is of a fluctuating kind, and the subject-matter of the contract is in its very nature exposed to daily variation and therefore time is "essential" in the contract. The fact that the contract is not for completion "on or before" but "on or about" November 10th does not make any difference.

Coslake v. *Till*, (1826) 1 Russ. 376, followed.

Held, further, that the sum of 200*l*. was in the nature of a penalty and could not be claimed.

Bradley v. *Walsh*, (1903) 88 L.T. 737, followed.

The deposit of 120*l*. was held forfeited and an inquiry into the damages suffered by reason of the breach ordered.

In re THE NATIONAL BENEFIT ASSURANCE COMPANY, LTD., (1931) 1 Ch. 46.

Company (Insurance)—Winding up—Participation agreements—No stamped policies under the agreements—Winding up of one company—Proof of alleged payments by the other company of premiums under the agreement—If admissible—Stamp Act, 1891, *Ss.* 92, 93 *and* 97—*Marine Insurance Act,* 1906, *S.* 84.

In 1920 *E* insurance company entered into a participation agreement with *L Y* insurance company for reinsurance under which the *E* Company was bound to cede and the *L Y* Company to accept a certain participation of all and every risk therein mentioned upon any marine insurance. The *L Y* Company was so entitled to a proportionate part of net premiums on the reinsured policies and the *E* Company to have certain commissions. A statement of account between the parties was to be rendered monthly by the *E* Company, and the balance in favour of the *L Y* Company were to be paid into a special account to be opened in the joint names of the parties. In 1921 the *L Y* Company was taken over by another Insurance Company, *N* Company, and in 1922 a new agreement (outward treaty) was entered into between the *E* Company and *N* Company on the same lines as the prior participation agreement, the *E* Company ceding to the *N* Company, and *N* Company accepting a participation of risks. In 1921 *N* Company entered into an inwards treaty

with the *E* Company, under which the *N* Company agreed to cede to the *E* Company, and the latter agreed to accept a share of all marine risks undertaken by *N* Company. It contained no provision for policies of insurance being issued, nor for particulars sufficient to enable the policies of reinsurance to be issued to satisfy the provisions of the Stamp Act, 1891. and of the Marine Insurance Act, 1906. No policies were in fact issued under the three agreements.

N Company was ordered to be wound up by the Court and the question arose if the *E* Company was entitled to prove in the liquidation for any sums paid by them for premiums under the outwards treaty.

Held, that the reinsurance treaty in question is invalid and void under Ss. 93 and 97 of the Stamp Act as also under the Marine Insurance Act. S. 84 of the Marine Insurance Act only applies where premiums have been actually paid by the assured to his insurer and not to a case like this where no premiums were actually paid but monthly statements of premiums and loss and quarterly statements of account are all that are provided for and the balance of account payable within 15 days after the account had been rendered and confirmed.

Even if they are treated as actual payments, the sections of the Stamp Act amount to an implied prohibition of each Act and therefore to an illegality on the part of the *E* Company, as the sections render the *E* Company liable to pay a penalty for each offence in paying or rendering himself liable to pay premiums in respect of unstamped sea insurances.

Bensley v. *Bignold,* (1822) 5 B. & Ald. 335; *Cope* v. *Rowlands,* (1836) 2 M. & W. 149 and *Brightman & Co., Ltd.* v. *Tate,* (1919) 1 K.B. 463, relied on.

The Barrow Mutual Ship Insurance Co. v. *Ashburner,* (1885) 54 L.J. (Q.B.) 377, distinguished.

Also apart from S. 84, the money cannot be recovered as on a total failure of consideration as the parties are in *pari delicto* and further the illegal agreement has been partially carried into effect.

T. M. FAIRCLOUGH & SONS, LTD *v.* BERLINER, (1931) 1 Ch. 60.

Landlord and Tenant—Two joint lessees—Action by lessor for recovery of possession based on forfeiture—One lessee alone praying to be relieved against forfeiture—Court, if can relieve.

Where the lessor brought an action to recover possession of demised properties against two defendants, who were joint lessees, on the ground that they neglected to perform certain covenants in the lease entailing forfeiture, one of the lessees appeared by a solicitor and asked for relief under S. 146, sub-sec. (2) of the Law of Property Act, while the other did not desire such relief, as he could not comply with the obligations under the leases.

Held, that where there are two or more lessees, one alone cannot apply to the Court for relief under S. 146. Unless the provision also enabled the Court in granting relief to absolve the other lessees from all future liability under the lease, the Court cannot give relief at the instance of one. The effect of granting relief is, according to *Dendy* v. *Evans,* (1910) 1 K.B. 263, to restore the lease as though it had never been forfeited and the result would be that the other lessees would continue to be liable under the onerous covenants in the lease. Even if the Court had such power, the Court would refuse it in its discretion.

In re HULTON. HULTON *v.* MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED, (1931) 1 Ch. 77.

Will—Construction—Gift of a clear sum after paying income-tax and super-tax—Surtax—If payable by the executors or the donee—Finance Acts, 1927 *and* 1928.

A testator by his will, dated 1924, declared that "out of the yearly income of my trust estate, my trustees shall pay to my said wife during her life such an amount as will give her a clear yearly sum of 12,000*l.* after paying or deducting income-tax and super-tax at the rates from time to time in force, but not as regards income-tax exceeding in the whole five shillings in the pound" subject to certain provisos. The testator died in 1925. In 1927 surtax was imposed in the place of super-tax by S. 38, Finance Act, 1927 and the question was if the annuitant was entitled to be paid 12,000*l.* free from the surtax.

Held, if the testator had simply directed his trustees to pay to his wife a clear yearly sum of 12,000*l.* after paying or deducting income-tax, the trustees would have clearly been bound to pay the surtax [In re *Crosse,* (1920) 1 Ch. 240]. In substance the surtax imposed by the Finance Act of 1928 is the

old super-tax in every essential feature disguised under a new name and therefore the same tax, and it would be defeating the clearly expressed intention of the testator to hold that the trustees of his will are not to pay the additional duty of income-tax merely because Parliament, for some reason, has given to the old super-tax the new name of surtax.

ATTORNEY-GENERAL *v.* SHARP, (1931) 1 Ch. 121.

Local Government—Licensing authority—Plying for hire omnibuses without license—Repetition of offence—If Attorney-General can move for injunction restraining the plying—Penalty under the Act, if the sole remedy.

The defendant, an owner or proprietor of motor omnibuses, was plying for hire his omnibuses without a license within the City of Manchester. The defendant had been convicted under S. 145 of the Manchester Police Regulation Act, 1844, and penalty imposed upon him under that section no less than forty-eight times, but these had no effect on him and he continued to act as he had done previously. The Attorney-General thereupon moved for an injunction restraining him from plying the omnibuses within the City of Manchester without a license.

Held, that the Attorney-General is entitled, quite apart from what might be called the individual remedy, to enforce the public rights which are enshrined in the Act by adequate proceedings for injunction, etc. The mere fact that the imposition of a fine is available under the Statute does not exclude the right of the Attorney-General to bring an action to prevent the infringement or threatened infringement of a public right if in his discretion he thinks it is a right course to follow.

Case-law discussed.

In re HARRIS, (1931) 1 Ch. 138.

Bankruptcy—Notice of bankruptcy petition—High Bailiff—Knowledge in his capacity as Registrar—If sufficient notice within S. 41, sub-sec. (2) of the Bankruptcy Act, 1914.

S Company obtained a judgment against *H* and proceeded to execution. On February 25th the High Bailiff *M*, whose business it was to levy execution, was paid out the decree amount and costs. Under S. 41, sub-sec. (2) *M* had to retain the sum so paid to him less execution costs for fourteen days as he was

also the "Sheriff" for the purposes of that section and under the Act if notice is served on him (Sheriff) within fourteen days (*i.e.,* March 11th) of a bankruptcy petition having been presented by or against the debtor and a receiving order is made, he (the Sheriff) shall pay the balance to the Official Receiver. *M* happened also to be the Registrar of the Court. On March 11th the debtor presented his own petition in this Court and the receiving order was made by *M* himself as Registrar. On March 12th the Official Receiver gave a formal notice to *M* of the bankruptcy petition and the receiving order. If that is the notice contemplated under the Act, it is beyond fourteen days and the Official Receiver could not claim it. The question was if the notice that *M* had as Registrar was sufficient to let in the Act and defeat *S*.

Held, that as the High Bailiff knew within the time, and knew by reason of the communication made to him by the debtor and by reason of something which took place in the debtor's presence, and was in fact effected by the High Sheriff himself in his capacity as Registrar, namely, the acceptance of the petition and the making of a receiving order, the Bankruptcy Act became fully operative to the knowledge of the High Bailiff and the Official Receiver was entitled to the money. There is no magic about "service"; the point is that the knowledge of the existence of the petition must reach the mind of the Sheriff.

WALTON HARVEY, LTD. *v.* WALKER AND HOMFRAYS, LTD., (1931) 1 Ch. 145.

Contract—Contract to permit electrically illuminated advertisement on defendant's buildings—The buildings acquired by local authority—Absence of condition exempting liability on acquisition—Condition if can be implied—Interest of advertisers in the buildings.

The defendants, lessees of a hotel in Manchester, entered into two contracts for the purpose of enabling the plaintiffs to exhibit for a term of years upon the roof of their hotel electrically illuminated advertisements and under them the plaintiffs were entitled to fix on the premises electric signs, etc., for the purpose. Before the expiry of that period, the Corporation compulsorily acquired the hotel and compensation paid to the defendants included a sum for the value of the rights of the defendants to receive the annual sums payable under these two

contracts during the unexpired periods thereof. The electric installations of the plaintiffs were all pulled down by the Corporation and in an action by the advertisers for damages against the hotel lessees,

Held, that the two contracts did not confer upon the plaintiffs any proprietary interest or estate in the hotel but only a personal obligation on the part of the defendants to allow the plaintiffs to fix and exhibit the electric sign, etc., that they did not even confer upon them sufficient interest to be entitled to compensation under the Land Clauses Act. But as the Manchester Corporation Act was passed in 1920, before the contracts were made and passed after notice to the lessees and occupiers of land, it cannot be said that the parties were ignorant of the provisions of the Act and the possibility of acquisition and therefore it is not possible to say that both parties must have made their bargain upon the footing that if the Manchester Corporation exercised their powers and took the hotel, the contracts were to be discharged. Cases where the power to acquire comes into being after the date of the contract distinguished.

In re FORREST: CARR *v.* FORREST, (1931) 1 Ch. 162.

Will—Codicil—Construction of—Gift by will to seven named legatees—Revocation under the codicil with regard to two—Effect of—Whether to be taken by the remaining five or intestacy.

A testatrix provided by her will that certain legacies should be paid out and further declared that the surplus remaining after payment of the legacies should be divided among seven named persons in a certain proportion. By a later codicil, however, she revoked the gift so far as two of them were concerned but confirmed the will in other respects. The question was if the shares in the ultimate residue to be given by the will to the two struck off persons ought to be treated as fallen into the residue and distributable accordingly between the five or ought to be treated as remaining undisposed of by the testatrix.

Held, that in the absence of any expressions in the will which lead to the result that the shares of residue revoked by the codicil should pass into the rest of their residue, the authorities establish that as to those shares there is an intestacy.

Sykes v. *Sykes,* (1868) L.R. 3 Ch. 301 and In re *Wilkins,* (1920) 2 Ch. 63 followed.

In re *Whiting,* (1913) 2 Ch. 1 doubted as irreconcilable with *Syke's* case.

WIMBLEDON AND PUTNEY COMMONS CONSERVATORS *v.* TUELY, (1931) 1 Ch. 190.

Corporation—Constituted by Act of Parliament—Power to Conservators to levy rates—Power to appoint officers and clerks for securing the execution of the Act—If implies power to pay pensions, annuities, etc.

A corporation constituted by an Act of Parliament to preserve the natural aspect and state of two commons at Wimbledon and Putney were empowered to do several acts to achieve that end and for the purpose of paying their expenses of management was entitled to levy rates, etc., on the tenants or occupiers of dwelling-houses within a certain radius of the commons. These rates were to be accumulated into a fund to be applied from time to time for the purposes of the execution of the duties under the Act. The corporation was empowered to employ officers and labourers on payments of such salaries and allowances as the Commissioners thought reasonable.

Held, that the corporation was empowered to make provision for their retiring employees also and a grant of pension or annuity was *intra vires* the corporation, notwithstanding the fact that no such power is expressly granted. Such an act is made only in furtherance of and for the efficient performance of the duties which the Act of Parliament throws upon them.

Cyclists' Touring Club v. *Hopkinson,* (1910) 1 Ch. 179, followed.

Observations of Keating, J., in *Marchant* v. *Lee Conservancy Board,* (1874) L.R. 9 Ex. 60, not followed as *obiter.*

In re STRATTON: KNAPMAN *v.* ATTORNEY-GENERAL, (1931) 1 Ch. 197.

Will—Charity—Bequest to "Vicar for the time being of the parish of Mortlake. . . . .to be by him distributed at his discretion among such parochial institutions or purposes as he shall select"—Validity.

A testatrix bequeathed the residue of the proceeds of sale of a house and a sum of 1000*l.* by two codicils to the "Vicar

for the time being of the parish of Mortlake . . . to be by him distributed at his discretion among such parochial institutions or (parochial) purposes as he shall select."

Held, that if a trust is to be constituted, it must be expressed in such terms as the Court, if appealed to, would be able to carry it out and it cannot give effect to a trust which is declared in loose words. The words of the codicils impose no restriction upon the activities to which the trust moneys might be applied nor is the Vicar's discretion in any way limited. In law it is not every parochial purpose which is a charity. There are many which are merely benevolent or humanitarian and as there are no words restricting the purposes to charitable, the gifts are invalid.

In re *Bain,* (1930) 1 Ch. 224, and In re *Barclay,* (1929) 2 Ch. 173, distinguished.

JOTTINGS AND CUTTINGS.

The Bishop of Birmingham's Case.—The advisers of the plaintiffs in *Notley* v. *Bishop of Birmingham* (*Times,* 11th instant), assisted by Mr. Justice Maugham, have found what appears to be a solution of the legal impasse created by the refusal of the Bishop to obey the order of Mr. Justice Bennett for the admittance of the Rev. F. D. Simmonds to the living of St. Aidan, Small Heath. The Bishop's action was based on Mr. Simmonds' refusal to undertake to abstain from a practice—the reservation of the sacrament—which the Bishop regarded as contrary to the doctrines of the Church of England. Fortunately, the High Court, unlike the Judicial Committee in the ecclesiastical cases which used to come before it, is not concerned with doctrine, but only with the legal right of the patrons of the living to have their nominee, if he is a fit person, duly admitted. The admittance, it seems, can be effected by the Archbishop of the Province, as well as the Bishop, and this alternative has been used to save the situation and render unnecessary any further process against the Bishop of Birmingham. Apparently the Archbishop of Canterbury will be willing to admit Mr. Simmonds. The law, of course, is impartial towards rival parties in the Church, and the age is not one in which these rivalries appeal to laymen generally. But for many sincere and earnest people they still have a real meaning, and even to others Browning's lines may give pause:

"All we have gained then by our unbelief
Is a life of doubt diversified by faith
For one of faith diversified by doubt."—*L.J.*, 1931, p. 109.

The Governor-General.—It is characteristic of our Empire—or, as we should now say, of our Commonwealth—that important changes may be made in its Constitution by a mere stroke of the pen. Since the Imperial Conference met last year two Governors-General have been appointed by His Majesty. The Governor-General of Australia was nominated on the recommendation of the Australian Premier and his appointment expressly declared that fact. The choice of a Governor-General of the Senior Dominion—Canada—has now been made and announced without any statement that His Majesty had been advised by anybody. Perhaps the criticisms which were expressed in Australia with regard to the method of Sir Isaac Isaac's appointment may be the reason for this interesting omission. No one can say that the new Governor-General is the nominee of any party—although it may be assumed that His Majesty's Ministers in Canada were consulted. In neither case was the Secretary of State—so far as the appointments show—asked to advise; and thus the recommendations of the Imperial Conference receive tacit approval. It would be interesting to know whether the system of Royal Instructions, which all Governors have hitherto taken with them, has also undergone a silent change.—*L.J.*, 1931, p. 110.

Innkeepers and Cars.—A case of great importance to hotel proprietors, and of hardly less importance to the public, came before the Divisional Court in *Winkworth* v. *Raven* (reported at p. 119 *post*). The plaintiff had occasion to stay a night at the defendant's hotel in Northampton, in February, 1929, during a period of intense frost. His car was placed in the hotel garage, which was not artificially heated. The garage was apparently open on one side, and the plaintiff, recognising the risk of the water in the radiator of his car becoming frozen, himself drained the water out; but, either because this action was taken too late, or, more probably, we imagine, because on his particular car it was necessary to turn two taps to get rid of all the water, and he only turned one, some water was left, and this froze, causing considerable damage to the car. Thereupon the plaintiff brought his action and recovered damages, the County Court Judge holding that having paid for his car to be garaged, the plaintiff was entitled to have it satisfactorily protected against frost. One would have thought that

the fact that he had himself done what he thought was necessary to drain the radiator was evidence that he was not holding the hotel proprietor responsible for frost, but the learned Judge does not appear to have dealt with that point, though he held that the plaintiff had not been guilty of any negligence.—*L.J.*, 1931, p. 111.

Innkeepers as Insurers.—Not unnaturally, the proprietor of the hotel appealed, and the Divisional Court considered the rights of the parties in detail. The defendant, they held, was not to be considered, in the circumtances, as a warehouseman of the car, or as a garage proprietor. He was an innkeeper, and his responsibilities were those, and only those, of an innkeeper. As far as theft of a guest's goods is concerned, an innkeeper might be said to be an insurer; if they were stolen, it was for the innkeeper to show that he was not responsible. But so far as injury, whether to the guest himself, or to his goods, was concerned, the burden was on the guest to show negligence on the part of the innkeeper. It is well settled that an innkeeper is only bound to supply such accommodation for his guest and his goods as he in fact possesses; and the fact that the defendant's garage was unsuitable for garaging a car during a severe frost unless precautions were taken to prevent the water in the radiator from freezing was as well known to the plaintiff as to the defendant. In those circumstances, the Divisional Court held that the responsibility for protecting the car from damage was on the guest, and not on the innkeeper, and that the latter had not failed in any duty owed to the guest; and the appeal was accordingly allowed. This decision seems to be plainly right, and to accord not only with law, but with common sense; it would plainly be unjust that every proprietor of a small country inn should be under such a responsibility in respect of the cars of his guests as the plaintiff in this case sought to impose on the defendant.—*L.J.*, 1931, p. 111.

Lord Ellenborough.—By the death last week of the sixth holder of this title, memories of the first Lord Ellenborough, the great Chief Justice, are naturally revived. While at the Bar, one of the most notable cases in which he was engaged was the impeachment of Warren Hastings. Describing those briefed for the defence of the Indian Administrator, Macaulay says they were "men all of whom were afterwards raised by their talents and learning to the highest posts in their profes-

sion, the bold and strong-minded law, afterwards Chief Justice of the King's Bench; the more humane and eloquent Dallas, afterwards Chief Justice of the Common Pleas; and Plumer who, near twenty years later, successfully conducted in the same High Court the defence of Lord Melville, and subsequently became Vice-Chancellor and Master of the Rolls." In describing Law as "bold and strong-minded," Macaulay employed those epithets which exactly characterised Ellenborough and his conduct on the Bench. That he was a great lawyer is beyond question despite Campbell's remark to the friend who spoke of the uniform excellence of Ellenborough's judgments as enshrined in his (Campbell's) reports, namely: "I have a drawer full of Ellenborough's bad law"; but merely all contemporary observers of his career speak of his irascibility. Judges, even the greatest of them, are human; their patience is sometimes sorely tried, and so it is impossible not to feel a certain sympathy with the remark of Ellenborough to a too persistent advocate: "We sit here not to court argument but to endure it".

Perhaps something of the irascibility which has been alleged as a defect in the judicial character of the Chief Justice was in part accounted for by a deficient sense of humour, with a consequent inability to see the ludicrous side of things. Flaxman, the sculptor, used to relate a droll anecdote illustrative of this. Lord Ellenborough was at dinner at a friend's house when a little girl came into the room crying bitterly. Being asked the reason of her distress, she said, "Lord Ellenborough is dead," and at the same time held the cause of her affliction in her lap—a dead owl to which this venerable name had been profanely given. His Lordship, it was said, was greatly offended. The story goes that he left the table; but there were those of a cynical turn who declared that at all events dinner must have been over before he did so. If the Chief was somewhat lacking in a sense of humour, his son Charles Ewan Law, who became Recorder of London, was not without a perception of the ludicrous, of which an instance is preserved in the pages of Serjeant Robinson's "Bench and Bar." It seems that he and a certain under-sheriff, who was very diminutive but whose opinion of himself was in inverse ratio to his altitude, could never get on satisfactorily together. One day in Court the Recorder spoke rather sharply to the little man, who remonstrated against such treatment, and some altercation took place to which Law put an end by saying, *"De minimis non curat lex"*, surely one of the neatest applications of the familiar

maxim on record. Burke would have said of it, as he said of another apt witticism, that it was dignifying a pun.—*L.T.*, 1931, p. 100.

Quick Justice.—Paragraphs in the daily press have been commenting on the fact that in a recent case at the Old Bailey a man who committed a crime on the 4th January, was tried and sentenced on the 13th January, an example of the rapidity with which punishment may sometimes follow the crime. But it seems that this is not a record in the matter of swift retribution following on offence. A correspondent of *The Times* has recalled that Bellingham, the murderer of Spencer Perceval in 1812, was committed for trial on the 11th May, was tried on the 15th May, and was executed on the 18th May, which probably is a record, if we leave out of account what was jocularly known as Jeddart Justice. This phrase, which signified trial after execution, acquired a certain sinister renown in the old days of the Border raiders, when very short shrift was meted out to each other's opponents. In the introduction to the Border Minstrelsy, Sir Walter Scott has something to say about Jeddart Justice, and in a note he adds that "a similar proverb in England of the same interpretation, is Lydford Law, derived from Lydford, a Corporation in Devonshire, where, it seems, the same irregular administration of justice prevailed. A burlesque copy of verses on this town begins:

> 'I oft have heard of Lydford Law,
> How in the morn they hang and draw,
> And sit in judgment after'."

We often hear complaints of slowfooted justice, but no one has yet suggested a reversion to the procedure associated with Jedburgh and Lydford!—*L.T.*, 1931, p. 124.

Judicial Titles.—Last week a distinguished silk in the course of his argument before the Court of Appeal cited a passage from a judgment of "Lord Justice Sterndale," to be at once told from the Bench that there never was any such person. There was Lord Justice Pickford, who became Lord Sterndale and Master of the Rolls. The same counsel was also citing a decision of "Lord Justice Jessel," also an incorrect designation for Sir George Jessel never bore this title. Curiously enough, it is not so many years since Lord Sterndale had to point out to a member of the Bar who was citing a judgment of "Lord Justice Field", that there was no Judge bearing that

title; there was Mr. Justice Field, who, later, became Lord Field, but he never was a member of the Court of Appeal. These may be small matters, but accuracy is desirable here as elsewhere.—*L.T.*, 1931, p. 125.

Perjury Again.—McCardie, J., has not abandoned the subject of prejury. Since his much-discussed lecture (fully reported in our issue of the 3rd instant, at page 9), he has told a witness that people who talk about forgetfulness, lack of observation or inability to collect one's thoughts never try cases; a thing is either perjury or truth.

It is interesting to compare this observation with the conclusions drawn by Mr. Justice Alpers from his experience in New Zealand courts. He ascribes most false evidence to "inaccurate observation, unconscious bias, faulty memory", and in psychological phrase "obstructive association of ideas", not forgetting the partisan spirit engendered by an "aggressive, suspicious or bouncing" cross-examination.

He cites an interesting case of the prosecution of a publican for Sunday trading. His house was on a corner and it was alleged that he served customers who entered by a door in a side street. The zealous but obviously honest witnesses against him had watched from a house opposite. They agreed exactly as to the number of persons who had entered and left the premises. Nevertheless at the trial two independent surveyors proved by plans that the side door in question was not visible from the window where the watchers sat. They had counted the people who entered and left the side street and their enthusiasm had led them to state as observed fact an inference, natural enough but not conclusive.—*S.J.*, 1931, p. 80.

Judicial Legislation.—In his fascinating volume on "Law and Opinion in England", the late Professor Dicey devotes one of the chapters to the part played by judges in building up the fabric of the law. He says, "As all lawyers are aware, a large part, and, as many would add, the best part of the law of England is judge-made law—that is to say—consists of rules to be collected from the judgments of the Courts". Upon the same theme Professor Jenks has a good deal to say in the second fasciculus which he has just contributed to the "Studies of the International Academy of Comparative Law", issued by a German firm of publishers on behalf of the Academy, his

special subject being the "Sources and Judicial Organisation of English Law". Into the comparatively small compass of his contribution he has packed a remarkable amount of learning; and as he was writing not so much for English readers, but for foreign students, he has touched many points which the English student might easily overlook. Dealing with what Dicey called "judge-made law", he points out that though in theory all judgments of the superior courts are authoritative, in practice only those which are reported in one or other of the recognised reports are cited as authorities—an observation which reminds us of the remark of Burke, that "to give judgment privately is to put an end to reports; and to put an end to reports is to put an end to the law of England." With a quiet humour, the professor goes on, in dealing with "authorities," to say that "decisions generally believed to be inconsistent with the current of judicial opinion are apt to be 'distinguished' on slight grounds from the case under discussion. *A fortiori*, decisions which betray a misapprehension or forgetfulness of a well-known rule of law are lightly regarded. In one well-known decision a Vice-Chancellor flatly declined to follow a recent pronouncement of the Lord Chancellor, his official superior, remarking casually, that 'Even Lord Chancellors sometimes make mistakes.'" We assume that this temerarious observation of the Vice-Chancellor rests on tradition, for we have been unable to find it in the report of the case in question. Probably the reporter declined out of caution to give immortality to so seemingly heterodox a statement, although true enough in fact. Do we not remember that a more recent Lord Chancellor gravely stated, to the astonishment of Lincoln's Inn, that if you want to find a resulting trust you naturally look for it on the face of the document under construction? The whole of Professor Jenks' monograph makes pleasant reading, and an added value is given to it in the eyes of foreign students by the very full and accurate bibliography of current statute law, law reports, and legal journals of the British Empire which has been compiled by Mr. Arthur Hewitt, the Assistant Librarian of the Middle Temple.—*S.J.*, 1931, p. 85.

Sentence of Outlawry.—It almost savours of a return to the dark ages to hear of a sentence of outlawry being pronounced by a British Court. Yet this was done in the Court of Justiciary in Scotland recently. What is meant by such a sentence and in what circumstances is it pronounced? Taking the latter half of the question first, we find that Baron Hume, in his

"Commentaries on the Law of Scotland respecting Crimes," says that "although our law justly refuses to take any step towards the trial of anyone in his absence, it is, however, very necessary on the other hand, that we should have some means of compelling to appear, or of driving out of the country, those wicked and dangerous persons who abscond owing to consciousness of their guilt. Our expedient for this purpose is sentence of fugitation or outlawry, which passes against the accused, on his absence at the diet of his libel, and is attended with the forfeiture of his person in law." In other words, and put more shortly, the sentence of outlawry is imposed where the person indicted fails to appear. Turning next to the consequences which follow the pronouncement against an accused person of the sentence of outlawry, Hume, as we have seen, says that it involves "the forfeiture of his person in law," which means that "he cannot bear testimony on any occasion, or hold any place of trust, or even pursue or defend in any process, civil or criminal, or claim any personal privilege or benefit whatsoever of the law." It might seem fairly evident that a person who has failed to appear to answer a grave charge preferred against him on indictment and has thereupon been declared an "outlaw", would not be likely to desire to give evidence in any other proceeding or put in an appearance to pursue or defend any process. To be thus precluded from doing things which *ex hypothesi* he would not be desirous of doing would, therefore, seem no great hardship, but the sentence may involve more than a mere deprivation of privileges, for the old law that outlawry may be followed by certain forfeitures of goods and profits from lands is still apparently in force. Moreover, the sentence of outlawry may be, and usually is, followed up by the Crown obtaining what are called letters of caption against the accused upon which he may be imprisoned if he is found within the Kingdom, and if he is thus arrested and imprisoned he is not bailable whatever the nature of his offence may have been. A person who has been declared an outlaw may however petition the Court to "repone" him against the sentence in order that he may stand his trial, and there have been several cases in which this has been done, one as recently as 1894.—*S.J.*, 1931, p. 86.

Doctor Johnson on "Ecclesiastical Patronage."—The recent discussion in the Church Assembly, and particularly the vigorous denunciation by the Bishop of Durham of "patronage trusts," serve to recall what Dr. Samuel Johnson, the great lexico-

grapher, had to say about the origin of private patronage Johnson, as is well-known, was a devout churchman. "Public worship," he told Boswell "required a public place; and the proprietors of lands as they were converted, built churches for their families and their vassals. For the maintenance of ministers they settled a certain portion of their lands; and a district through which each minister was required to extend his care, was, by that circumscription, constituted a parish. The churches which the proprietors of lands had thus built and thus endowed, they justly thought themselves entitled to provide with ministers; and where the episcopal government prevails the Bishop has no power to reject a man nominated by the patron, but for some crime that might exclude him from the priesthood: for, the endowment of the church being the gift of the landlord, he was consequently at liberty to give it according to his choice to any man capable of performing the holy offices. The people did not choose him because the people did not pay him." To-day we have many churches built and maintained not by individuals, but by congregations. There, of course, the case is different; and as, moreover, very few churches erected by private landowners are now maintained except by their congregations, the patronage question has assumed quite a different aspect. None the less it is always interesting to recall the perfectly reasonable and proper origin of customs which are being gradually abolished in these modern days.—*S.J.*, 1931, p. 126.

Law and Letters.—In an address, full of charm and phrased with an exquisite felicity, which Lord Macmillan delivered to the American Bar Association at their meeting in Chicago last autumn, and which is now accessible to English readers in the pages of the current number of the *Judicial Review,* stress is laid upon the obligation incumbent upon the lawyer as a member of a learned profession to cultivate an intimate acquaintance with the well of English undefiled in the classics of our noble language. As Lord Macmillan says, "there is no reason why legal arguments or judicial judgments should not be expressed in good English. There is every reason why they should. The advocate who can impart a literary flavour to his address adds to its persuasiveness and attraction." This is a very different attitude from that adopted by one of the Lords of Session in former days of whom Boswell tells us in his "Life of Dr. Johnson". It seems that Boswell had taken literary counsel with the doctor while preparing a written argument to be laid before the Court of Session, but all the trouble he had incurred

would appear to have been thrown away so far as this particular judge was concerned, as he subsequently told Boswell that he need take no pains in the preparation of such papers for it was merely a case of "casting pearls before swine." No doubt the remark was made jocosely, but it was scarcely in its form complementary to the intellectual equipment of the members of the Bench. Needless to say, Lord Macmillan, who has a hereditary love of letters and has himself the pen of a ready writer, will have none of this. In his view it is essential that the lawyer, if he is to attain efficiency in his calling "should be steeped in literature, and keep his mind constantly refreshed and renewed by contact with the great thinkers of the past." No better counsel than this can be given to him who is entering the profession, and well will it be if to it he gives heed.—*S.J.*, 1931, p. 126.

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THE MADRAS BAR COUNCIL.

We publish below the report of the Bar Council on the working of the Bar Councils Act in Madras since the inauguration of the Madras Council in 1928. It was placed before a conference of representative members of the profession convened by the Council itself and, in opening that Conference, the Advocate-General delivered an impressive address reviewing the position and explaining the main purpose of the Conference. As was to be expected, the report as well as the address drew attention prominently to certain aspects of the working of the Act, especially in connection with the exercise of disciplinary jurisdiction, and some of the resolutions of the Conference deal with this subject. We have no doubt that most of these resolutions will commend themselves to the profession as well as to the public. It will be in consonance with the policy underlying the Bar Councils Act that in the matter of dealing with alleged cases of professional misconduct, the Council should be not merely a reporting authority but the deciding authority as well. We, however, deem it our duty to point out that the Council as well as the profession will best serve their interests not by resenting outside scrutiny of their professional conduct but by so fixing their standard of conduct and judgment as to be beyond cavil or criticism. From time to time the profession is reminded of the difference between its estimate of itself and the public estimate of it and let it not be said even by the most carping critic that the members of the profession are disposed to be far too lenient towards their erring brethren. From this point of view, it seems preferable to secure finality to the verdict of the Bar Council in disciplinary matters, not by a statutory rule *excluding* the jurisdiction of the High Court but, by the growth of a convention according to which the High Court

will deservedly respect the decision of that Tribunal. Resolution No. 6 complaining against the entrustment of such enquiries to a District Judge seems to us rather misconceived. Under the Act, a case can be so referred only *after consultation with the Bar Council* and the Select Committee explained this provision as inserted only on grounds of convenience "as a tribunal of the Bar Council will not in all cases be in a position to enquire satisfactorily into matters which have occurred in the mofussil." We, have no reason to think that any such reference will be made *against* the wishes of the Bar Council. In any event, it may be desirable if not sufficient to provide that the report of any such enquiry shall be forwarded to the Bar Council itself, to be dealt with by it as if on an enquiry made by a Committee of the Council itself. There is much to be said in favour of the suggestion that when an Advocate is charged with a criminal offence, the matter should in the first instance be taken before the ordinary criminal courts of the land; but it must be understood that an acquittal there will not preclude proceedings under the disciplinary jurisdiction, if the acquittal is based on grounds that do not negative moral turpitude.

It may not be out of place if we refer here to a feeling of disappointment in some quarters that it has not been possible for the Conference to deal with many other topics. Against such disappointment, it may be pointed out that the Conference was not a general gathering of lawyers assembled to deal with all questions in which the profession is interested but a representative body convened by the Bar Council for certain stated purposes. We would, however, emphasise the desirability of the Bar Council putting itself in closer touch with Bar Associations in the mofussil and eliciting their views and suggestions on all important questions as and when they arise. Materials thus collected from time to time may be conveniently placed before special conferences with a greater certainty that all aspects of a question are likely to have been considered at leisure and with due deliberation.

Opening the Conference, the Advocate-General said:

On behalf of the Members of the Bar Council, I deem it a great privilege to extend a most cordial welcome to the Members assembled in this Conference representing various associations in the mofussil and in the metropolis. This is the first occasion on which a conference of this kind meets after the Indian Bar Councils Act was passed. With all its defects and

imperfections the Act is a genuine attempt to unify the Bar in each one of the provinces of India, recognising the claims of the Bar as a confraternity of a learned and honourable profession to regulate the discipline of its own members, to lay down rules of conduct and etiquette for the guidance of its members, the conditions of entry into the profession and to set the right standards of legal education and training in order that the members of the legal profession might efficiently discharge their duties to their clients, to the Court, and towards the public.

The epoch closing with the Bar Councils Act is a period of no mean achievement of the Indian Bar. The Bar in the different provinces of India may not be able to claim the hoary traditions of the English Bar but within the comparatively short period of its history, since the implanting of British legal institutions into this country, there can be no gainsaying that it has played a great. honourable and a distinguished part in the evolution of the legal institutions of this country and of its legal system.

We can easily re-call names among the members of the Indian Bar who, in point of legal erudition, forensic eminence, and skill in the art of advocacy, are not behind some of the great names which have adorned the English Bar.

The Bar in our own province is not likely to suffer by comparison with the Bar in the rest of India. Mr. Eardley Norton, one of the ablest advocates of the Madras High Court, in his reminiscences, has paid a most eloquent tribute to some of the great leaders of the profession in Madras, who had made the reputation for Madras.

Sir V. Bhashyam's eminence in the profession is rightly looked upon by the Madras Bar as a part of its heritage and is a living tradition with it. The Mofussil Bar can be as much proud of the achievements of Sir S. Subramania Aiyar, his versatility and his genius, as the Madras Bar. In my own time it has been my proud privilege to come in contact with some of the greatest personalities of this Bar. In my early days at the Bar, I used to stand dazzled by the forensic eloquence of Mr. V. Krishnaswami Aiyar, the directness and force of Mr. P. R. Sundara Aiyar's advocacy which in the language of a late Chief Justice of this Court now in the Judicial Committee, reminded people of Sir Charles Russell; the quickness, penetrating intelligence, the matchless skill and adroitness of Sir K. Srinivasa Aiyangar, not to mention the great ability and resourcefulness of some of the leaders of the Bar who are still happily with us.

On the bench, the members of the Indian Bar have distinguished themselves in such a manner as to compel the admiration and the encomiums of the Judicial Committee on several occasions. They have enriched the Indian jurisprudence and made it a living system and not a feeble replica of the English system. Great Judges of the type of Sir Bhashyam and Sir Subramania Aiyar, Nanabhai Haridas, Dwarkanath Mitter, Gurudass Banerjee and Sir Ashutosh Mukerjee, Telang and Ranade, and Mahmood of Allahabad, are men of whom any country may well be proud. I am not mentioning Sir T. Muthuswami Aiyar, as he was technically not of the Bar. The members of the Bar have filled high offices of State with credit and distinction and recently members of the Indian Bar have been elected to the Judicial Committee.

Quite in keeping with the traditions of the Bar in other countries, the Bar in India has played no mean part in the movement for Indian freedom, and in the constitutional and political progress of this country. In the legislatures of the country, the Indian lawyer has exhibited a remarkable debating and parliamentary skill, though success in the forensic field is by no means a true measure or indication of one's success as a parliamentarian. Fortunately in India the experiment was not tried as in England once of excluding lawyers from the legislatures which earned the Parliament from which lawyers were excluded the unenviable reputation of being called "unlearned". The Indian lawyer has shown his capacity for statesmanship and settlement of national questions and has proved himself to be equally at home at conferences, negotiations and national diplomacy as in forensic advocacy. Sir T. B. Sapru and the other great lawyers of India that took part in the Round Table Conference have rendered a great and signal service to their country in this direction. The future India need not therefore despair of producing lawyers who can think in terms of society, the State, the nation, and the commonwealth.

BROTHER MEMBERS OF THE BAR.—This Conference has been mainly convened with a view to take stock of the working of the Bar Councils Act for the last 3 years in this presidency and to enable the members of the Bar to suggest any remedies for removing the defects or for improving the existing machinery. As we are meeting on the eve of great constitutional changes and of the "birth of a new State," to use the significant phraseology of the Lord Chancellor of England, we owe it to ourselves to make our suggestions to His Majesty's Govern-

ment and the countries' representatives at the Round Table Conference in regard to the re-organisation of the judicial system as a part of the governmental structure.

In all civilised countries at the present day, and especially in countries permeated by British jurisprudence, the efficiency of State machinery is rightly judged with reference to the principles on which justice is administered. The judiciary is alike the bulwark of the freedom of the individual as of the security of the State.

The subjects which are set down in the agenda will give you an idea of the problems on which you are called upon to give your considered opinion. Under the Bar Councils Act, as you are aware, *ad hoc* tribunals are constituted for the consideration of particular causes or complaints. The rules for regulating the procedure before the tribunal are made by the High Court. Opinion has been expressed in some quarters that the procedure so laid down in regard to the inquiry before the tribunal, though conceived of as being in the interest of the practitioner, tends to prolong the inquiry and is too complicated. It is for you to consider whether consistently with the principle that the proceedings against a practitioner are of a quasi-criminal character, it is possible to devise a simpler, more elastic and easy procedure.

Again, there is a feeling in professional circles that there is no justification for the tribunals of the Bar Council consisting as they do, generally, of eminent lawyers serving merely as repertoires to the High Court I have heard it said that the function assigned to the Bar tribunals is not consistent with the dignity of the profession and with the autonomy of the Bar. On the other side it is urged with equal force that as an advocate has a right to plead and act, the practitioner is an officer of the Court and the ultimate and residuary jurisdiction should necessarily vest in the Court. It is for you to consider whether it is possible or necessary to suggest any appropriate amendment to the existing enactment in regard to the sphere of functions of the Bar Tribunals and the High Court.

Questions have also been raised as to the extent or degree to which the conduct of a hearing has to be entrusted to a complainant and the exact sphere of duty of the Tribunal of the Bar Council, in cases where the complainant does not choose to prosecute his complaint as also in the matter of the safeguards against frivolous complaints being lodged against prac-

titioners which may have the effect of an undue publicity and loss of reputation which might ruin the career of a practitioner.

Under the Indian Bar Councils Act, the Bar Council has the right, with the previous sanction of the High Court, to make rules to regulate the admission of persons to practise in the High Court, provide for the qualification to be possessed by persons applying for admission as advocates and the conditions subject to which advocates of other High Courts may be entitled to practise in the High Court. The Council is also entrusted with the jurisdiction to make rules, subject to the sanction of the High Court, regulating the rights and duties of the advocates and their discipline and professional conduct. It may be a question for consideration as to how far it is necessary to have the previous sanction of the High Court in the matter of all these rules and whether it is not enough that the High Court is invested with the jurisdiction to veto any particular rule or classes of rules which may have the effect of interfering with the powers and duties of the High Court.

The Council is also expected to take upon itself the duty of giving facilities for legal education and conducting examinations under its auspices. Section 15 of the Act provides in terms that the Bar Council may, with the sanction of the High Court, make rules for the giving of facilities for legal education and training and for the holding and conduct of examinations and the charging of fees in respect of the education provided or for the right to appear for the examinations held by the Bar Council.

It is common knowledge that both in England and the Dominions the control of legal education and the testing of the fitness of people for entrance into the profession has always been in the hands of the profession. It has always been thought that the interests alike of academic studies and of fitness for the profession demanded a differentiation between University legal studies and instruction in a course of law for testing the fitness as to admission into the profession.

On account of historic accidents and the absence of a trained body of lawyers in the early years of British Indian rule, the course of legal studies has naturally assumed a different direction in India. The framers of the Bar Councils Act were evidently influenced by the consideration that the time has come for the parting of the ways. It is for you, gentlemen, to consider whether in the interests of sound legal education and of efficiency it is desirable for the Bar Council to prescribe

any special tests or undertake the duty of imparting legal education to any extent. The problem is one which bristles with difficulties. If it were possible for the Council to take over the administration of the Law College, our way might be rendered smooth. But for that, we have to count on the consent of the Government and the University authorities. The question of an independent course of instruction without reference to the existing college or the University authorities, though theoretically possible, will resolve itself ultimately to one of finance.

The report, which the secretary has placed before you, will give you an idea of our exact financial position. With a view to enable us to discharge our statutory duties efficiently, we made an appeal to the Government for financial assistance, but we are sorry to say that the appeal has not met with any response.

Even in such a matter as the expenses in connection with the conduct of proceedings before the Bar Tribunal where the necessary professional assistance was not placed before the Court, the Bar Council felt considerable difficulties, but as the result of a deputation to the High Court, the Council is glad to say, that the matter has received the sympathetic consideration of His Lordship the Chief Justice, and the High Court has so amended the rules as to relieve the Bar Council of this burden. Our thanks are due to the High Court and to the learned Chief Justice.

The Council is no doubt entitled to charge fees with the sanction of the High Court in respect of enrolment and may levy the fees contemplated in section 15 (*d*). But the profession can easily realise how far it can use its power in this respect. There is a feeling that already the member entering the profession is overtaxed, in that he has to pay a heavy enrolment fee of Rs. 625 and that is why the Council felt there was no justification to demand more than Rs. 50 in respect of an admission. We wish the Government would see their way to paying us a portion of Rs. 625. In spite of our financial position, the Council has undertaken the institution of a special course of lectures in subjects which are not included in the curricula of studies for the B.L. Degree examination.

Gentlemen, it is for the profession to deeply consider the problem whether, even if a regular and complete course of legal education cannot be undertaken at this stage by the Bar Council, it is not feasible to devise special tests for entrance into the profession.

I would only take a few minutes of your time on the subject of the re-organisation of the judiciary which is the other important subject in the agenda before you. Professional opinion in India is unanimous that there ought to be an immediate separation of the executive and judicial functions in the new dispensation. The majority of the Services Committee in the Round Table Conference were for the elimination of the civilian element in the constitution of the judiciary. There is a strong body of opinion in favour of the view that the present constitution of the High Court is an anomaly and an anachronism.

As you are all aware, its heterogeneous composition is due to historical accidents. When the first High Courts were established, the Indian Bar had not attained anything like its present dimensions and did not command anything like the prestige it commands to-day. There was a sharp difference between the methods of judicial administration in the metropolis and in the mofussil. Even the law applied to the settlement of the disputes between party and party was not the same in the mofussil as in the metropolis. The era of codification had just commenced. The fusion between the Supreme and the Sudder Courts had just been accomplished. To secure the efficiency of the new tribunals (High Courts) that were established, it was felt necessary to secure a minimum proportion of the civilian element and the barrister element in its composition.

The civilian was expected to make his contribution by bringing to bear upon the work of the High Court, his wide knowledge of local and mofussil conditions, his training as a judge and an administrator and his knowledge of the vernaculars of the country gained in the early years of his career.

The barrister was expected to impart a freshness of outlook and independence and to enrich Indian jurisprudence with the aid of the ever-fertile source of English law and equity.

The constitution also provided for the High Court being presided over by a barrister as Chief Justice. Recruitment from the indigenous Bar and the provincial judiciary was optional and was left to the enabling clause. It needs no argument to convince any one that there is absolutely no justification for the perpetuation of the present constitution. Conditions have completely changed and we are living, as it were, in a new world. The Indian Bar is not behind the Dominion or even the English Bar and there is absolutely no reason why the principle of the recruitment to the highest court from the ranks solely of the Bar which has added to the prestige of the

judiciary in every part of the British Commonwealth should be departed from in India.

In pressing the case for the Bar, I am not unmindful of the fact that since the establishment of the High Court, we have had several able and efficient Judges on the High Court from the ranks of the Civil Service and Judges like Sir R. West and Holloway have also made great contributions to our jurisprudence. I need hardly say that I yield to none in my respect for some of our present day civilian judges.

Even if there is any room for difference of opinion as regards the recruitment solely from the Bar, there is no room consistently with the accepted principle of recruitment to the highest court with the sole and single eye to efficiency, for the perpetuation of any rigid rule of proportion, or for imposing any disability on any member of the Indian Bar from becoming a Chief Justice. The Bar has every right to feel that the present constitution is a slur on its capacity and its attainments. The Bar Council and the Madras Advocates Association have already expressed themselves very strongly in favour of a thorough change in the constitution and composition of the High Court and have sent their representations to the authorities and to some of the lawyer members at the Round Table Conference. We trust and hope that the Indian delegation would see to our recommendations being carried out.

It is now agreed on all hands that the future constitution of India should be federal and the Indian State should be composite in its character. Federalism implies a definition and demarcation of the functions and powers of the several units composing the composite structure. The constitution of a Supreme Court with power to settle inter-statal or inter-provincial disputes, to pronounce finally on the constitutionality or otherwise of the enactments of the provincial, central or federal legislatures is therefore a practical problem awaiting solution at the hands of our constitutional experts. In regard to a court acting as an arbitrator between States, Governments and Legislatures and the extent and degree to which a court has to be invested with jurisdiction in this behalf, gentlemen, you are aware that there is a sharp difference of opinion among political thinkers.

On the one hand, it is urged that to invest a court with a plenary jurisdiction in these matters would be practically to transfer political power in a democratic state from the people's representatives to a body of judges trained in legal formula and legal ideas and that you cannot always be sure of having Mar-

shalls to regulate the working of the constitution and thereby decide the destiny of the State. On the other side it is urged with equal force that if the instrument of Government is to provide for a composite structure, is to define and demarcate functions between the component units, a judicial determination of the respective spheres of functions is an inevitable concomitant of federalism.

The investing of the jurisdiction in a Supreme Court in constitutional matters might raise the further point as to how far the normal functions exercised by tribunals in countries governed by a written constitution in the course of an ordinary litigation on their being called upon to decide on the *ultra vires* or *intra vires* character of the legislation is to be encroached upon or to be inter-related to the constitutional functions of the Supreme Court. The question has also to be considered as to whether it is advisable to drop altogether the system obtaining under the present constitution, of constituting the Governor-General or the Governor as the sole arbiter in regard to certain constitutional matters. In regard to the Supreme Court functioning as an inter-statal tribunal, the nature of its jurisdiction may not be of the same character in regard to inter-statal (meaning thereby between two Native States) and in regard to disputes inter-provincial, or between province and a State.

Again in dealing with inter-statal disputes, the subject of what constitutes justiciable disputes, which by no means is an easy matter, may assume importance and the question will have to be considered as to how far matters which come now under the head of paramountcy should be brought under the jurisdiction of the Supreme Court.

These are some of the problems which await solution at the hands of our constitutional experts. Above all, the prestige which the court will command will depend upon the principles on which the court is constituted. Is it too much to hope that, if such a tribunal is to be established for the whole of the Indian Continent, its constitution will provide for the court being recruited on the principles on which the world court is constituted under the League Covenant? If that is done, I am full of hope that the Indian Supreme Court will command the respect and the prestige which the U. S. Supreme Court deservedly commands.

Before I close my remarks I would allude to one or two points which have cropped up as a result of the suggestions made by the mofussil members of the Bar. I would request the

Conference to consider the desirability of having a Council of Law Reporting on the lines of the Incorporated Council of Law Reporting established as early as 1864 in England. In regard to representation of the mofussil members in the Bar Council, may I throw out a suggestion that it will be much better to leave it to some kind of convention rather than have a special statutory provision in that behalf. I wish that the Council had been in a position to arrange a Conference of all the lawyers of the Presidency but considerations of business expediency had compelled them to have recourse to the procedure of inviting representatives of associations both in the city and the mofussil. The Council appeal to the members of the Bar to accept the procedure in the right spirit. The Bar Council being a statutory body representing the advocates of the Presidency felt constrained to invite only advocates to the Conference and regretted very much that they were not in a position to extend their invitation to the pleader members of our profession. The Council also take this opportunity of requesting all the members of the mofussil Bar, eligible to become advocates, to become such forthwith.

REPORT.

The Indian Bar Councils Act was brought into force with respect to the High Court of Judicature at Madras by the notification of the Government of India, dated the 27th March, 1928, with effect from 16th July, 1928. The first rules of the Bar Council relating to the election of its members and the transaction of its business were made by the High Court on 4th August, 1928. According to the proviso to section 4 of the Act the Advocate-General, Madras, is the Chairman ex-officio of the Bar Council. Of the remaining 14 members 10 were elected on 22nd September, 1928 and four were nominated by the High Court on 29th September, 1928. The Bar Council met for the first time on 9th October, 1928, when the late Sir Murray Coutts-Trotter, the then Chief Justice, opened the proceedings with an address of welcome to which the Advocate-General made a reply.

The Bar Council has a number of duties to discharge under the Act and it had to equip itself with the necessary means to perform them satisfactorily. The Registrar of the High Court was requested to give one of the rooms of the High Court to the Bar Council to have its office and he with the sanction of the Chief Justice was so good as to comply with the request. For this and other similar acts the Bar Council desires to express its sense of gratitude. A certain amount of preliminary work had to be

done before the Bar Council could actually begin to function. A Committee was appointed to go into the financial position of the Bar Council and to make proposals about the appointment of the staff necessary to carry on the work of the Bar Council. Another Committee was appointed to frame rules under sections 8 and 15 of the Act regarding the qualifications which would entitle persons to be enrolled as advocates, and the conditions under which advocates on the roll of other High Courts in India, may, in special cases, be permitted to appear in our High Court. Accepting the recommendations of the Budget Committee the Bar Council resolved to have a full-timed Secretary to be in charge of its office and accordingly the Secretary was appointed in December, 1928. In the meantime, the Rules Committee had framed the draft rules which were considered by the Bar Council and were after approval placed before the High Court for sanction. Care was taken to include in these rules a provision which would enable the different classes of legal practitioners to be enrolled as advocates. The case of second grade pleaders however was left out as the High Court had long ago ceased to give second grade pleaders' certificates and as the class of second grade pleaders would in the course of time become extinct. The High Court made a few alterations in the rules proposed and sanctioned them in April, 1929, so that they might come into force with effect from 16th July, 1929. The Bar Council could not in the interests of the profession agree to some of the modifications made by the High Court nor to its being saddled with the onerous task of conducting the examinations for articled clerks of the High Court as a condition precedent to its getting the conduct of the examination for apprentices into its hands. But as the Bar Council was anxious to start work and as the intervention of the summer vacation would further postpone the final passing of these rules it decided to accept the modifications for the time being and to press for its original proposals later on. Thus though the Act has been in force since July, 1928, the Bar Council began to function actually only after 16th July, 1929.

The business of the Bar Council is transacted ordinarily at one of its meetings, but any particular matter may in the discretion of the Chairman be disposed of by placing it before the members of the Bar Council in circulation. There were in all twelve meetings of the Bar Council and these meetings were held in the Chambers of the Advocate-General as the Bar Council Office was too small for that purpose. The interval between consecutive meetings varied from one to two months, and depended upon the accumulation of work to be placed before the Bar Council for consideration. The imparticability of convening meetings of the Bar Council oftener than it has been possible and the necessity of disposing of certain matters expeditiously required the appointment of the Standing Committees of the Bar Council to deal with matters

relating to (1) discipline, (2) enrolment, (3) examination, and (4) finance. Excepting matters of special difficulty or importance which were referred to the Bar Council, all other matters falling within their respective spheres were finally disposed of by these committees. Besides these standing committees the Bar Council appointed other committees from time to time to deal with particular questions coming up before it for solution.

The following are some of the important matters which came up before the Bar Council for consideration:—

(1) the steps to be taken to do away with different grades of legal practitioners and to have a unified bar;

(2) unlicensed persons regularly practising before Income-tax Officers and Courts and the means to put a stop to the practice;

(3) private vakils appearing in criminal cases;

(4) the statutory provisions relating to the constitution of the High Court Bench and the consequent difficulty in filling up the vacancies occurring in the High Court Bench;

(5) rule of the Rangoon Bar Council in effect denying to the advocates of other High Courts as such, the right to practise even in the subordinate Courts of Burma;

(6) the appointment of more official receivers to ensure quick dispatch of business;

(7) the effect, if any, of the mere insolvency of a lawyer on his right to practise; and

(8) touts and how to meet the evil.

Committees.—The Rules Committee has already been referred to. The Committee appointed to frame rules of professional conduct and etiquette brought forward before the Bar Council a number of rules to be observed by members of the Bar in the discharge of their professional work. These rules were thoroughly discussed by the Bar Council and it was found that with regard to certain questions on this subject it was not possible to lay down a general rule. Such questions were therefore reserved for consideration at a future date and rules were formulated by the Bar Council only in certain matters.

The Discipline Committee of the Bar Council was appointed on 2nd February, 1929, to deal with complaints of misconduct against advocates and also other matters regarding the professional etiquette. These matters had till then been referred to the Professional Etiquette Committee or reserved for consideration at a meeting of the Bar Council. The Committee met in all 26 times and disposed of 26 complaints, 50 applications for permission to be directors of joint stock companies and 13 letters requesting the

opinion of the Bar Council on specified questions. In six of the complaints the facts were such as to call for an enquiry and they were accordingly forwarded to the High Court. In 13 others the advocates concerned were able to give a satisfactory explanation and no further action was deemed necessary. Three of the complaints were withdrawn by the complainants which they were permitted to do as the Committee was satisfied that the withdrawals were made *bona fide* and not in collusion with the advocate with intent to avoid an enquiry. The remaining four complaints were returned as the practitioners complained against were not advocates. Permission to be a director of a joint stock concern was granted in all excepting five cases and these five were referred to the Bar Council for disposal. In most of these cases in which permission was granted the business concerned was a bank and the advocate's remuneration as a director was quite nominal. Of the other five cases permission was granted in three but refused in two, in one of which the advocate sought permission to be a district inspector of a certain tea company and in the other the objects for which the company was formed appeared to be questionable. The questions which came up before the Committee for opinion have, some of them, been already stated while dealing with the work of the Bar Council. To these may be added the further questions—

(*i*) whether a servant of a Native State, while on leave, is entitled to resume practice as an advocate, if the rules of the State had no objection;

(*ii*) whether the power of the High Court to refer a complaint for enquiry to a District Judge under section 10 of the Act could be exercised after the complaint had been referred to a Tribunal of the Bar Council;

(*iii*) what is the duty of an advocate who is in possession of information directly bearing on a matter under enquiry by the Court.

The Enrolment Committee was appointed on 21st July, 1929, to deal with all matters connected with the admission of persons as advocates. The Committee met 70 times and disposed of 292 applications for enrolment and 85 other applications. The Examination Committee was appointed on 21st July, 1929, to deal with all questions connected with the examinations conducted by the Bar Council. The Bar Council holds twice a year, in the months of April and October, an examination in the Law of Practice and Procedure which every pupil has to pass in order to qualify himself for enrolment as an advocate. The Committee did not think it necessary to make any change in the practice of setting question papers in two parts, one part to be answered without books and the other part to be answered with books. The Committee also held one examination for articled clerks of the High Court

and another has been arranged to be held about the end of this month.

Legal Education.—The Bar Council is seriously handi capped in this respect. In its present financial position it is not possible for it to have a well-equipped library and separate accommodation which are essential requisites if it is to afford facilities for legal study and research. Until its financial prospects are improved the Bar Council has to content itself with what little it can do by arranging for occasional lectures. Even for this purpose it has not sufficient funds. The annual income is only sufficient to meet the working expenses of the Bar Council. Whereas the expenses are bound to increase with the increasing volume of work, the income on the other hand is quite uncertain and may possibly go down. However, an attempt was made to make a beginning with the co-operation of the members of the Bar. Several leading members were requested to deliver lectures to the pupils and most of them readily consented. The Bar Council takes this opportunity to thank all those gentlemen who were good enough to undertake the task at considerable personal inconvenience. In the year 1929-30 a series of eight lectures was delivered on select portions of the two Procedure Codes, Limitation Act and Bankruptcy, and in the present year 1930-31 a series of seven lectures has already been delivered on the two Procedure Codes and a series of lectures on Limitation Act and Bankruptcy is being delivered. Besides these lectures the Bar Council also arranges every year a course of lectures on professional conduct and advocacy. All these are with the permission of the Registrar arranged in the Court rooms outside working hours.

Tribunals.—The High Court if it does not summarily reject a complaint of misconduct against an advocate has to refer it either to a Committee of the Bar Council or to a District Judge for enquiry and report. This Committee called the Tribunal is constituted for each case by the Chief Justice from among the members of the Bar Council and has to consist of not less than three and not more than five members and one of the members so nominated is appointed the President of the Tribunal. Nothing is mentioned in the Act about the special functions, if any, of the President nor what is to happen if there is a difference of opinion among the members of the Tribunal. The Act is not clear as to the exact character of the Tribunal so constituted. The question was raised whether the Tribunal could function in the absence of any one of the members. The Bar Council resolved that it is not desirable that the enquiry should proceed if any member is unable to be present. Again what is to be the actual bearing of the report on the final order in the case? There is no clear provision in the Act to hear the complainant before final orders are passed by the High Court but it has power to make the proper

order as to costs. These are some of the questions requiring decision. A few of these questions arose in some cases and the High Court has decided them in one way or other. Such of the matters as can be made clear by the rules made under the Act have to be so dealt with. Other subjects require statutory amendments.

The High Court has framed rules to regulate the procedure to be followed in enquiries before Tribunals and District Judges. These rules closely follow the procedure in warrant cases in criminal trials, but the advocate concerned is given an option to give evidence as a witness on his behalf. At first, provision had not been made in the rules for cases in which the complainant was unable to prosecute his case on account of poverty or for those cases where there was no complainant and the case was taken up by the High Court without a complaint. When this was brought to the notice of the High Court additional rules were framed which still left one point unsatisfactory. According to these latter rules the expenses of engaging an advocate were to be met by the Bar Council out of its funds and the fee paid by the Bar Council included in the final order for costs made by the High Court. The Bar Council took objection to its being made liable to pay the fee for engaging an advocate as such fee may or may not be finally recovered. The High Court after hearing the contentions of the Bar Council was pleased to amend the rules so that all the expenses of conducting the prosecution of the complaint before the Tribunal will be met by the High Court. It has been considered necessary to dwell at some length on this subject as some of the cases referred to the Tribunals of the P___Council had a rather protracted trial. In one or two cases there was an additional factor, namely, the Tribunal had not the assistance of an investigating agency like the police in criminal trials.

The total number of cases referred for enquiry were 14 in 1929, 7 in 1930 and 3 in 1931 up till now. In 13 of these cases final orders have been passed by the High Court. Only in one of them did the High Court differ from the report of the majority of the Tribunal acquitting the advocate. In all the other cases the High Court upheld the findings of the Tribunal and passed orders accordingly. Of the rest no order may be necessary in one of them as the advocate concerned has already been struck off the rolls. Out of the remaining ten cases one was allowed to be withdrawn by the High Court and three others are awaiting the final orders of the High Court. In two out of these three the High Court was not satisfied with the reports and so remitted them back to the Tribunals for further enquiry. Final orders have not been passed on the revised reports. There are at present six cases pending before the Tribunals of the Bar Council and it is hoped that these will be disposed of without delay as the rules of procedure have been amended so that the High Court will meet the

expenses in all cases where there is no complainant or where the complainant is unable to bear the expense.

Finance.—Last but not the least is the question of finance. Soon after the formation of the Bar Council the Registrar of the High Court who had been acting till then as its Secretary handed over to the Chairman, Bar Council, a sum of Rs. 18,648-6-0 which represented the balance out of the amount received from advocates under section 8 (2) of the Act after defraying the election and other expenses of the Bar Council. Out of this amount a sum of Rs. 14,764-9-10 was, with the previous sanction of the High Court, invested in 5 per cent. 1945-55 Bonds of the face value of Rs. 14,000, and the balance was reserved for meeting the current expenses of the Bar Council.

The sources of income of the Bar Council under the Act are the fees payable to it in respect of (1) enrolment of advocates, (2) enjoyment of educational facilities provided, and (3) the right to appear at examinations held by the Bar Council. The difficulties in the way of the Bar Council providing educational facilities have already been referred to and therefore there are practically only two sources of income. With regard to the first of these, namely, the fee payable to the Bar Council at the time of enrolment, the Act provides that in the case of persons falling under section 8 (2) (*a*) of the Act the fee shall be Rs. 10 and in the case of others the fee is that fixed by the rules of the Bar Council. The Bar Council of Madras found itself at a disadvantage as against other Bar Councils in the matter of prescribing a fee to be paid to it on enrolment. While in all other provinces except Bengal the stamp fee realised by the Government for entry as an advocate is only Rs. 500, here in Madras it is Rs. 625. Even in Madras till 1922, the stamp fee was only Rs. 500 and it was then increased to Rs. 625. The Bar Council had to take this circumstance into account in fixing the fee payable to it in respect of every enrolment. It was hoped however that the Government could be persuaded to reduce the stamp fee to its old rate so that the Bar Council may make a corresponding increase in the fee payable to itself. But the Government was neither willing to reduce the stamp fee nor to forego a portion of it in favour of the Bar Council. In these circumstances the Bar Council had to keep the fee fixed at Rs. 50 only. If the income under this head be examined we find that in the year 1929-30 (July to July) there were 154 enrolments and in the next year 1930-31, the number fell to 120. The fall in the number is chiefly due to the fewer pleaders who applied for enrolment as advocates. From the number of pupils now studying in the chambers of advocates it seems probable that the number of enrolments in the next year may come up to 100 only. If it be remembered that the number of enrolments in 1929-30 was considerably increased by the great number of

pleaders who availed themselves of the Bar Council rules for enrolment, it is fairly clear the number of enrolments in future years is not likely to exceed 100 per year.

The other source of income is the surplus remaining out of the examination fees after meeting the expenses of the examination. Even under this head there has been a decrease in the surplus from that of the last year, as it is not now necessary that pleaders should pass the procedure examination in order to qualify themselves for enrolment. There were 121 candidates for the examination of October, 1929 and 114 for April, 1930, but there were only 63 candidates in October, 1930 and there are only 95 candidates for the examination to be held this month. Even if the income from these two heads be taken at their best they are only sufficient to meet the necessary expenses of the Bar Council. It will be hardly possible to save sufficient sum of money which may be made available for investment. With the increase in the volume of work done by the Bar Council more accommodation will be necessary for the office, and if a good library is to be maintained it will be desirable to have a separate building too. The Bar Council has to hold its examinations in one place, lectures in another place and the sittings of the Tribunal in a third place. With separate accommodation and a well-furnished library the Bar Council can with ease take up the work of legal education. Further the Bar Council should not have to depend for its ordinary expenses wholly upon the varying incomes of each year, but it is eminently desirable that it should have a funded capital sufficient to yield an income enough to meet its annual working expenses. The question is how to find the amounts necessary for these essential requisites. Something beyond the small savings that might be made annually is necessary. An attempt must be made not only to improve the income from the existing sources but other possible sources must be found.

RESOLUTIONS PASSED AT THE LAWYERS' CONFERENCE.

(1) That in the opinion of this Conference it is desirable that every complaint against an advocate should be lodged before the Bar Council and that every complaint to the High Court should be referred to the Bar Council before an enquiry is directed and a tribunal constituted.

(2) That in the opinion of this Conference it is desirable that the constitution of the tribunal for enquiry into cases of misconduct may be left to the Bar Council.

(3) That in the opinion of this Conference it is desirable that a finality should attach to the findings of the Bar Council Tribunal.

(4) That any aggrieved party may have the right to appeal to the Bar Council to review the findings of the Tribunal.

(5) That it is undesirable that the High Court should have any jurisdiction to interfere with the findings of the Tribunal or of the Bar Council as the case may be, at any rate in cases where the practitioner has been acquitted of misconduct.

(6) This Conference is of opinion that the District Judge should not be invested with any jurisdiction in regard to the enquiry in respect of an advocate's conduct.

(7) That in the interests of the profession and the public it is necessary to institute a faculty or society of advocates for the whole of the Province with authority to admit and enroll practitioners and with complete disciplinary jurisdiction over the practitioners.

(8) This Conference is of opinion that it is undesirable that proceedings should be initiated against an advocate under the disciplinary jurisdiction in cases involving a criminal offence which has no direct reference to the discharge of professional duties before the matter has been enquired into and tried by the ordinary criminal Courts.

(9) That in regard to the rule-making powers of the Bar Council, this Conference is of opinion that instead of the rules being subject to the previous sanction of the High Court, it is enough that the High Court is invested with a power of veto in regard to any specified class of rules.

(10) That this Conference requests the Bar Council to bring to the notice of the Government and the members of the legislative bodies, the resolutions passed at this Conference and to urge upon them the necessity of undertaking legislation for remedying the defects in the Indian Bar Councils Act in the light of the resolutions passed at this Conference.

(11) This Conference appeals to the electorate to see that a proper and fair representation is secured to the mofussil Bar and to the members of the junior Bar at the coming election.

(12) In the opinion of this Conference the time has come for a thorough change in the constitution and composition of the High Court and the High Court Bench should be solely recruited from the ranks of the Bar and from such as have practised at the Bar; in any event there is absolutely no justification for perpetuating any rule of proportion or imposing any disability on a certain class of practitioners from occupying the office of Chief Justice.

(13) This Conference endorses the recommendations of the majority of the Services Committee of the Round Table Conference in regard to the elimination of the civilian element from the judiciary.

(14) In the opinion of the Conference, as a part of the general constitutional changes it is desirable to give immediate

effect to the principle of the separation of the Executive and Judiciary.

(15) That in the opinion of this Conference, it is necessary to have a Supreme Court as a part of the general federal structure for all India with power (*i*) to decide constitutional questions, (*ii*) to decide inter-State, inter-provincial, inter-State and provincial disputes with necessary sanctions attached to the judgments of the Tribunal, and (*iii*) to act as a Court of reference in respect of constitutional questions or the *ultra vires* and *intra vires* character of legislation arising in the course of litigation before the ordinary tribunals. That in order to ensure the proper functioning of the Supreme Court and in order that the Supreme Court might command the necessary respect and prestige, the Court should be so constituted as to secure among its *personnel,* lawyers of the highest eminence on the lines of Article 2 of the Statute relating to the Permanent Court of International Justice.

(16) This Conference is of opinion that Court-fee under the existing enactment is operating harshly on the litigant public; it is not in consonance with sound principles of administration of justice that the Court-fee should be treated as a special source of revenue to the State. This Conference urges upon the Government to undertake the immediate revision of the Court Fees Act so as at least to reduce the Court-fee to the level obtaining before 1922.

(17) This Conference is of opinion that Bar Associations should be formed in all mofussil centres where they do not exist at present and that all advocates of the Presidency should enrol themselves as members of such Associations.

(18) This Conference requests all First Grade Pleaders eligible to become advocates to take steps to get themselves enrolled as advocates.

(19) This Conference requests the Government to pay over to the Bar Council 50 per cent. of the stamp fee levied for entry as an advocate with a view to enable the Bar Council to satisfactorily discharge its statutory functions.

DISCUSSION ON RESOLUTIONS.

The main question which was discussed was the relative sphere and the functions of the Bar Council Tribunal, the Bar Council, and the High Court in regard to disciplinary proceedings against a practitioner. The discussion was initiated by Dewan Bahadur T. Rangachariar, Vice-Chairman of the Bar Council and Leader of the Opposition, Legislative Assembly. The following delegates took part in the discussion: Messrs. C. Brooke-Elliott, T. R Venkatarama Sastri, S. Varadachariar, P. Venkataramana Rao, K. V. Krishnaswami

Aiyar, Ganti Lakshmanna, V. Govindarajachari, K. Sanjiva Kamath, N. Thiruvengadatha Aiyangar of Kumbakonam, S. Rangaswami Aiyangar of Devakottah and K. Ramasesha Aiyar of Calicut. The general sense of the Conference was in favour of giving a finality to the findings of the Bar Council Tribunal. There was a strong feeling against the High Court being clothed with power to interfere with the finding of the Tribunal. The general sense of the Conference was also against disciplinary proceedings being taken against advocates in cases involving a criminal offence not arising in the discharge of one's professional duties before the ordinary Criminal Courts had been moved in the matter. The Conference was against an enquiry being conducted by District Judges into conduct of advocates.

In the evening, the Chairman and the members of the Bar Council gave a garden party to the advocates in the compound of the High Court. The party was well attended.

The Conference next discussed the question of the necessity of the amendment of the existing rules in regard to the procedure at the hearing before the Bar Tribunals. Mr. C. Brooke-Elliott opened the discussion and suggested simplifying of the procedure on the lines of the Solicitors Act in England. It was pointed by some of the members including Messrs. T. Rangachariar and P. Venkataramana Rao that a departure from the existing procedure might embarrass the practitioner in cases where there was something in the nature of a crime attributed to the practitioner in the course of the discharge of his professional duties. Mr. T. R. Venkatarama Sastriar expressed a leaning in favour of the simplification of the procedure. After some discussion it was decided to leave it to the Bar Council to consider feasibility and the desirability of a simplification of procedure in consultation with mofussil Bar Associations and placing suggestions before the High Court. Under the circumstances it was felt that there was no necessity to have any independent resolution on the subject.

Some discussion then ensued on the question of the necessity of a proper representation of the mofussil members on the Bar Council and the Conference passed resolution No. 11: "This Conference appeals to the electorate to see that a proper and fair representation is secured to the mofussil Bar and to the members of the junior Bar at the coming elections".

CONTROL OF LEGAL EDUCATION.

There was a lively discussion on the question as to the necessity and the desirability of the Bar Council as representing the profession organising legal studies and instituting its own tests for the purpose of judging the fitness of persons entering the profession. The general feeling was in favour of the profession directing the control of legal education with a view to test the

fitness of candidates for entering the profession. Some of the members pointed out the financial difficulties as also the inadvisability of reduplication of legal studies and legal examinations. Some others pointed out that there was no necessary conflict between the University giving an academic direction to the study of law and the profession and the Bar Council devoting more attention to the practical side of it. A large number of members took part in the discussion including the Chairman of the Conference, Messrs. B. Sitarama Rao, T. R. Venkatarama Sastri, K. V. Krishnaswami Aiyar, K. V. Sesha Aiyangar, T. R. Ramachandra Aiyar, President of the Advocates Association and T. Rangachariar. The following resolution was passed: "This Conference is of opinion that early steps should be taken for the Bar Council, as representing the profession, imparting legal education and instituting law examinations with a view to test the qualifications for entry into the profession." The Conference appointed a committee to devise ways and means for giving effect to the principles of the resolution. The Committee consists of the Advocate-General, the members of the Bar Council, Sir C. P. Ramaswami Aiyar and Messrs. V. V. Srinivasa Aiyangar, S. Varadachariar, P. Venkataramana Rao, K. V. Krishnaswami Aiyar, Ganti Lakshmanna, M. Kalidasu, V. Govindarajachari, P. Govinda Menon, K. Sanjiva Kamath, Kota Subba Rao, K. V. Ramaswami Aiyar, Prabhala Lakshmi Narasimham, and N. Thiruvengadatha Aiyangar.

Constitution of the High Court.

The next subject taken up was the constitution and composition of the High Court. The Conference was unanimously of opinion that the time had come for a thorough change in the constitution and composition of the High Court and that the High Court should be recruited entirely from the ranks of the Bar or such as had had an active practice at the Bar. The discussion was initiated by Mr. P. Venkataramana Rao, Government Pleader. In an elaborate speech, he went into the whole question at full length and referred to the judicial system obtaining in the Dominions, the Quebec resolutions and the British North America Act and pointed out that there was absolutely no justification why the High Courts in India should not be directly recruited from the Indian Bar having regard to the importance which it had attained to-day. Mr. S. Muthiah Mudaliar, ex-Minister, also strongly supported the resolution and pointed out that the Madras Government had already committed itself to the principle that old disabilities should be removed and that the rule of proportion laid down in the Government of India Act should be abolished.

Supreme Court for India.

The next subject taken up was the question of the constitution of the Supreme Court. Mr. T. R. Venkatarama Sastriar, ex-

Advocate-General, initiated the discussion. In the course of his speech he referred to the fact that even publicists who were originally not in favour of a federal constitution were for the institution of a Supreme Court as a part of the new constitution, and that the question had become a practical problem, after the deliberations at the Round Table Conference and the declaration by His Majesty's Government that the future constitution of India should be federal in its character. If ultimately the future constitution was resolved upon to be federal, the question of a Supreme Court with power to decide constitutional, inter-State or inter-provincial questions was a necessary concomitant of federalism.

There was some discussion on the question as to whether the Supreme Court should be a concurrent or exclusive Court of Appeal from the High Courts in the provinces and if the Supreme Court was to be a Court of Appeal, what exactly were the powers to be reserved to the Judicial Committee. One or two members expressed whether the discussion of the question of the Supreme Court was not premature. The Conference while clear on the necessity of having a Supreme Court to decide constitutional matters was not quite decided on the other question mooted. The opinion was unanimous on the question that unless the Supreme Court was manned by lawyers of highest eminence, the Court was not likely to function properly.

Appointment of Official Receivers.

Next, the question of the appointment of Official Receivers was taken up. There was a feeling at the Conference that there was much needed reform in regard to the institution of Official Receivers in the mofussil. The Conference requested the Bar Council to take up the question of Official Receivers and submit proposals to the Government.

The last question taken up was the question of permitting advocates in the mofussil to take apprentices. The President made an appeal to the members to defer the question for some time in view of the fact that at present the various mofussil stations were not equipped with good libraries and in view of the difficulty of instituting separate course of lectures in professional ethics and other matters in Madras and in the mofussil. The Conference accordingly deferred the consideration of the question to a future date.

President's Concluding Remarks.

The President in the course of his concluding remarks thanked the members for their cordial co-operation and for the response which the invitation of the Bar Council had received at the hands of the mofussil and the Madras associations. He said that he himself had very little experience of presiding at conferences and

but for the enthusiasm, the earnestness and the cordial co-operation of those assembled at the Conference, the Conference would not have been the success that it was. He also referred to the services of Mr. K. S. Krishnaswami Aiyangar and gratefully acknowledged the help which he had always received at the hands of his colleagues on the Bar Council a good number of whom were his respected elders.

Dewan Bahadur T. Rangachariar, on behalf of the Conference, conveyed his thanks to the President and paid an eloquent tribute to the address delivered by the Chairman and to the way in which he conducted the proceedings. The speaker humorously remarked that the President showed himself to be a benevolent autocrat imbued with a strong democratic spirit. The President was their official head and representative; but if it was a question of choosing a non-official head, there could be no doubt that the choice would fall on the official head. Mr. Rangachariar hoped that there would be frequent conferences of lawyers in the Presidency.

Mr. N. Thiruvengadatha Aiyangar also joined the previous speaker in thanking the President.

Mr. Prabhala Lakshmi Narasimham of Vizagapatam, while thanking the President, referred to the good work that the Bar Council had done and especially to the services done by Mr. K. S. Krishnaswami Aiyangar. Mr. Narayana Menon of Ottapalam associated himself with the previous speaker in thanking the Bar Council.

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HINDU LAW REFORM—PROPOSALS IN MYSORE AND BARODA.

There seems to be fairly general agreement that Hindu Law stands in need of some modification—having regard to changed social conditions—though there may be considerable difference of opinion as to any particular modification proposed. There may be some people—their number is, however very small—who are opposed to all change but even in their case the objection is more grounded on a doubt as to the wisdom of the change than on any feeling as to its repugnance to religion. In fact, judging from what the leading commentators of the Mitakshara School say, it seems to be clear that they do not regard the particular rules of inheritance they are laying down as having the same authority as vedic injunctions relating to morality or religion. On the other hand, they seem to be seeking justification for those rules very largely in usage. In putting forward the secular conception of property, Vijnaneshwara must be taken to have definitely rejected the theory of sacrosanctness and the recasting of those rules having regard to the changed conditions cannot be said to involve any serious interference with the religious feelings and sentiments of Hindus. It will be found on examination that much of the law that is administered to-day, in fact a large portion which causes dissatisfaction is judge-made law. For instance, Vijnaneswara is much more liberal to women than the Courts to-day. He did not accept the theory that women by reason of their sex are disentitled to inherit nor is there any foundation in his treatise for the rule that women take a limited estate in property inherited by them. All property however acquired is Stridhana according to his definition and it is judicial decisions that excluded inherited property from the category of Stridhana under the influence of the retrograde Bengal School.

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Again, the theory that women *prima facie* take only a limited estate under grants *inter vivos* or by will is a creature of judicial decisions but happily so far as Madras is concerned, that view no longer holds the field. For this, we are indebted to the late Mr. Justice Seshagiri Aiyar to whom we are also indebted for several pieces of ameliorative legislation. The Madras Hindu Gifts and Bequests Act for which he was responsible did away with the rule as to the invalidity of gifts to unborn persons laid down by the Privy Council in the Tagore case. The Hindu Law of Inheritance (Act II of 1929) for the initiation of which also he was responsible, gives a certain amount of relief to women by bringing son's daughter, daughter's daughter and sister (and with her the sister's son also) before more distant relations into the Mitakshara line of heirs. They had been put off or excluded by Courts against the Mitakshara and out of deference to decisions from Bengal. The Hindu Inheritance (Removal of Disabilities) Act (XII of 1928) removes the disabilities of persons suffering from disease, deformity or physical defect from inheriting with one exception, *i.e.*, congenital lunacy or idiocy. The fact that these various Acts of the Legislature were carried through without any serious opposition is clear testimony in favour of the general agreement referred to above and of the fact that the Hindu mind has ceased to associate the rules of inheritance with religion. The most eloquent testimony is however afforded by another piece of legislation recently passed, *viz.*, the Hindu Gains of Learning Act. When the late Sir Bhashyam Aiyangar tried to pass a legislation to the same effect through the local legislative council, there was such a storm of opposition outside that the Governor was compelled to refuse his assent to the Bill although it had been passed by the Council. The present Act was passed without notice in the papers and without serious opposition in the Council.

There still remain several other matters which require consideration. They centre mainly round women's rights. There is a feeling that the position of widows of co-parceners in joint families requires improvement and that having regard to the larger probability in the future of women remaining unmarried, specially after the recent Sarda Act, long after attaining majority, some provision should be made for unmarried sisters. There is also a feeling that more women relatives should come in as heirs and with better regard to their propinquity than at present. There is further the feeling that women are unnecessarily restricted in their enjoyment of inherited property. One other

thing that is to be noticed in this connection to which sufficient attention is not paid is that a very large proportion of litigation in this country relates to the validity of alienations by limited owners and it is in the interest of the public that some means should be found for avoiding this unhealthy and vicious litigation. Added to this we have great uncertainty of title introduced by conflicting judicial decisions as regards the effect of surrender, consent of reversioners and so forth. Adoption is another prolific source of litigation. Here again, the law is largely judge-made law. On many points in connection with that matter, the law can hardly be said to be settled. For a long time arrangements by the widow with the natural parents of the adopted boy used to be held to be binding but recently the Privy Council has held otherwise. It must be the aim of legislators not to introduce further confusion and create other and further occasions for litigation. If a new rule is to be made, it should be clearly expressed and all its implications should be made easily ascertainable. Rules looking plain on paper, for want of sufficient thought on the part of the legislatures, so often bring in a legacy of ruinous litigation.

These matters have been the subject of consideration by two Committees, one in Mysore and another in Baroda who have made elaborate recommendations.

The latter Committee while dealing with women's rights have also taken advantage of the opportunity to recommend the abrogation of the rules as to disqualification to inherit by reason of disease or physical defect. They would go further in this matter than the Indian Act by removing all such disabilities. There would seem to be no point, however, in having a committee for the whole lifetime of a lunatic. In their puritanic zeal, the Baroda Committee, would also recommend that concubines and illegitimate sons should have no right of maintenance. This is in marked contrast to the provision in the Mysore Committee recommendations which brings illegitimate children of women as heirs to Stridhan. On the one hand we do not like that the humane provisions of the Hindu Law as to maintenance should be interfered with; on the other we are free to confess we do not equally like in the interest of morality and decency that rights of inheritance should be extended to illegitimate issue.

The Baroda Committee had the advantage of starting with the benefits conferred by the Bombay rule which is more liberal to women than the Madras or the Mysore Rule. The way in which the Mysore Committee have set about improving the

condition of women commands our assent, however, much one might be disposed to disagree with some of their recommendations. They build on the old foundations. They merely vary the details. For instance, they take the Mitakshara scheme, giving the unmarried sister, the mother and the step-mother a share and they extend the rule by giving them a share in all circumstances. But they overdo it and therein lies the weak point about their recommendations. The Baroda Committee give the right only to unmarried sisters and widows and confine it to joint family property. The Mysore Committee are more ambitious and catching hold of the theory of subordinate interest of wives and children even in a man's self-acquisition, propounded in the Mitakshara, make it a legal right and extend it to mothers, step-mothers, unmarried sisters and unmarried daughters. This is sentiment with a vengeance. When we speak of unmarried sisters, there is a point of time at which their status can be ascertained, that is the father's death. But when we speak of unmarried daughters, no such point of time is involved in the conception and in the absence of any provision that their right to a share should cease on marriage, it looks as if the result is we have a right by birth both in respect of sons and daughters. So little thought has apparently been bestowed on this part of the recommendation that care has not been taken to indicate what is to become if there are more than four sisters or daughters as the provision is that each sister and daughter should take in the absence of a brother living, a fourth of what her father would have taken. That may be a slip. It is provided, no doubt, that the right should not be enforceable in respect of self-acquired property during the lifetime of the acquirer. Right by birth is bad enough in favour of sons and some day may have to be abolished if India is to prosper industrially but rights in favour of daughters, sisters and step-mothers would seem to be indefensible. A further objection in relation to this matter is that sufficient care has not been taken to indicate the rights and powers of the acquirer or the managing member in the interval when the rights are not asserted. So far as one can see, it is not contemplated that the heirs of the ladies should be entitled to claim the share if they do not choose to assert their right. These provisions are apparently only designed to put the male members on good behaviour. When new kinds of rights are created, it is incumbent on the legislating authority to state clearly the implications of the rights so created. On the whole we think—subject to what we have to say about the widow's rights—that the recommendations

of the Baroda Committee are the only feasible or proper recommendations in this matter but even those recommendations have to be further supplemented by clear definition of the rights *inter se* and the powers of the members of the family.

Connected with this matter there is another equally novel recommendation in the Mysore Committee report about the personal liability for the maintenance of step-mother, unmarried daughter, legitimate or illegitimate, widow of pre-deceased son, unmarried sister and widowed daughter if destitute and unable to secure maintenance from the husband's family. The Smrithis with all their humanity, much beyond anything known till recently in the West, make provision in that way for the maintenance of only aged parents, chaste wife and infant children. They make provision for a very large body of relations as against joint family property. The Committee would seem to erect all the extravagant moral claims of family ridden India into legal claims including that of the step-mother with her proverbially strained relations with the step-sons without regard to whether they were living together or not, whether the father married after division or before, and whether there was family property or not and the same liberal scale of maintenance is provided for all cases alike. The Baroda Committee are more modest in its recommendations. They only add the destitute widowed daughter living with the family to the list of persons entitled to maintenance from the family property One should have expected the Committees consistently to impose a similar liability on mothers to maintain the children when they could afford or on the daughter-in-law to maintain the father-in-law or the mother-in-law, and the step-mother, the step son especially having regard to the large opportunities of acquiring wealth afforded by their recommendations.

The next recommendation of importance is the introduction of the female descendants and male descendants (through females) of the father, grandfather and great grandfather as heirs. That seems to be unexceptionable but the extension of the rights of inheritance to women connected only by marriage that is to say, to widows of the descendants as well as collaterals would seem to be wholly against prevailing sentiment and is contrary to the provisions of all the known other systems of civilised jurisprudence. The widows of members of the family are the only persons whose claims, we think, need be considered. The Mysore Committee recommend that the definition of Stridhan should be made to include the share got at partition pro-

perty inherited from husband and other relatives connected by blood, income and acquisitions from income of all properties held by women whether as Srtidhan or otherwise. In framing rules for succession, inherited property is made to descend to both sons and daughters. As between daughters they abolish the distinction between married and unmarried, provided and unprovided daughters. The distinction is abolished also with respect to property inherited from males with perhaps this distinction that the unmarried daughter is entitled to an additional share. That is a welcome change. The Baroda Committee would make children of pre-deceased daughters take with daughters. That would seem to be more in accordance with prevailing sentiment than the present rule.

The result of conferring the character of Stridhana on property inherited from husband and relatives male and female connected by blood is that only property inherited by widows of male relatives would be held for a limited estate. Even in those cases, their powers are extended so as to include power to spend for the maintenance and education of their descendants or for acts of charity. Partial surrenders and surrenders for consideration are recognised. Consent of reversionrs is taken to be sufficient to justify alienation. Litigation may thus be reduced to some extent, but one is not quite certain as to the result, as a new body of heirs are introduced whose desire to defeat the reversioner is likely to be greater than in the case of the previously recognised female heirs, for in most cases hitherto the next reversioners are daughters and daughters' sons. The Baroda Committee seek to achieve the same result by confining the right to challenge alienations to daughter, daughter's son, mother, father, brother, father's mother, sister, step-brother, step-nephew and step-sister. Another alternative which neither committee consider would seem to be to provide a cheap method by application to court after notice to reversioners as under the Settled Land Acts in England of securing an order of the court which might be made conclusive in the absence of fraud or collusion The Baroda Committee have introduced, however, another fruitful source of litigation by conferring on widows absolute estate up to 12,000 rupees out of their husbands' estate When we remember that widows are given share in joint family property the result might be they continue undivided for years together and in the absence of any method of keeping the absolute portion and the other portion distinct, there must be the greatest confusion and consequently litigation when division takes place,

Coming to the question of giving shares to widows of co-parceners, in joint family property, we are not at all sure that much popular sentiment can be found in favour of the proposal. The feeling is only that more liberal provision should be made for their maintenance. The award of half a share under the Mysore Committee recommendations might in cases of small property be less advantageous to the widows than the alternative right to maintenance. As however widows cannot be compelled to take a share, the recommendation might not be objectionable from the point of view of widows. But the popular sentiment being as said above, and having regard to the evils of over-partition, the probability, almost certainty of widows insisting upon partition on the advice of their relatives whenever advantageous and having regard to the facilities afforded by the new rule as to declaration of intention on the part of the co-parcener being sufficient to effect a severance putting it in his power to let in the ordinary rule of inheritance under which the widow or mother would be entitled to come in or to make other suitable arrangements it does not seem desirable that widows should be given a share in the joint family property. The very fact that the Mysore Committee are not prepared to declare in favour of tenancy in common in place of joint tenancy shows that though we are heading towards individual ownership, we have not yet arrived at a stage where we are prepared to abolish the joint family altogether. At the present juncture we should think the legislature should stop at liberalising the rule as to maintenance of widows and of giving a share to the unmarried sisters as contemplated by the Mitakshara in the joint family property. On the other hand we sympathise with the suggestion of making inherited property Stridhana if for nothing else for the reason that it will put a stop to the very undesirable and unhealthy conditions existing at present the widow and her relations trying to devise means how best to defraud the reversioners and the reversioners ever on the alert to badger and annoy the widow and the consequent ruinous litigation. It is not unlikely that removal of legal claims on the part of the reversioners will restore good feelings which may turn out to be much more advantageous to the parties sought to be benefited by the present rule. As for protecting women as against themselves, we do not believe in it at all. We think South India women are quite as able to manage as men-and even if they are not so at present, with larger opportunities for management they will soon become so.

The Mysore Committee would raise a presumption of authority to adopt similar to that raised in Bombay and would further validate all arrangements made with the natural parents of the adopted son for the benefit of the widow. That would seem to be a natural corollary to the recognition of absolute rights in widows in inherited property.

B. S.

CORRESPONDENCE.

To

THE EDITOR.

Official Receivers in the Moffusil.—One branch of the law requiring greater attention in a period of economic depression is the administration of the property of insolvent debtors. Never during the last quarter-century since the passing of the first Provincial Insolvency Act (III of 1907) was there so frequent a resort to the Insolvency Court as the last few months have been witnessing. Under the power vested in the Local Government by section 19 of that Act and the corresponding section 57 of Act V of 1920, Official Receivers are appointed in the Moffusil Districts, and the local limits of their jurisdiction extend throughout the areas under the respective District Judges. Though the High Court is empowered under section 79 (2) of Act V of 1920 (corresponding to section 51 of Act III of 1907) to provide rules for the appointment and remuneration of Receivers (other than Official Receivers) for carrying into effect the provisions of the Insolvency Act, instances do not seem to be in evidence of such Receivers having been appointed.

Under the English Bankruptcy Acts upon which the Indian Law of Insolvency is mainly modelled, each Court which has bankruptcy jurisdiction has attached to it *one or more* Official Receivers. *Cf.* (1883) 46 and 47 Vict., c. 52, Ss. 66 and 67. The number of such Receivers to be appointed will doubtless depend upon the extent of the business involved, and the requirements of efficient administration. It is conceivable, therefore, that when the first Provincial Act was passed, the Local Governments considered that the provision of one Official Receiver for the jurisdiction of each District Court would sufficiently meet the requirements of public service. Further, the enactment of the law for the first time in 1907 on a comprehensive basis would have been by way of an experimental measure, as the later modi-

fications in the Act of 1920 indicate, and the Official Receiver under the existing law is not only the Receiver for insolvent estates, but has the powers of an *interim* Receiver of properties belonging to persons whose insolvency is pending adjudication.

The duties of Official Receivers are manifold, and, it may further be added, are very taxing; if efficient discharge of such duties is to be expected. They relate both to the administration of the debtor's estate, whether before or after adjudication, as above stated, and also to the investigation of the conduct of the debtor who has come within the jurisdiction of the Bankruptcy Court. Such investigation into the conduct of persons coming within the Insolvency law will be facilitated if entrusted to Officers closer to hand than the single Official Receiver stationed at the District Court may reasonably be expected to make.

When one or more Subordinate Courts are functioning in each district with jurisdiction more or less co-ordinate in respect to the law of insolvency with the District Court, and the pressing need of the time is centering more upon the insolvency jurisdiction, it is time that the Local Governments consider the desirability of appointing Official Receivers for each of the areas under the jurisdiction of a Subordinate Judge. For the speedy disposal of judicial business, Government appoints additional Judges to the Subordinate Courts, but it is anomalous that so far as Official Receivers are concerned, not more than one for each district has so far been appointed, while, some cases, as, for instance, East and West Tanjore have both only one Official Receiver in common. Any attempt on the part of the Moffusil Courts to appoint Special Receivers is liable to question as was the case in *Official Receiver, Tanjore* v. *Nataraja Sastrigal*[1] and convenience or efficiency are removed out of the competency of the local Courts to judge, though "special reasons" within S. 57 (2) enable them to appoint special Receivers in extremely rare occasions.

The remuneration of Official Receivers depending upon the receipts obtained by them is no doubt a factor to be reckoned with, but judged by present conditions it should not be difficult to adjust the bankruptcy business so as to enhance the utility of appointing an Official Receiver for the local limits of the jurisdiction of every Subordinate Court in the Presidency.

M. V. V. K. RANGACHARI,
Cocanada.

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1. (1922) I.L.R. 46 M. 405: 44 M.L.J. 251.

SUMMARY OF ENGLISH CASES.

PEECH v. BEST, (1931) 1 K.B. 1.

Grant—Exclusive right of sporting over farm—Covenant for quiet enjoyment of—Sale of part of land—Erection of building by purchaser—If infringes the sporting rights—Right of action.

An owner of a farm of 700 acres in extent granted to the plaintiff for a term "the exclusive right of shooting and sporting in over and upon . . . Hazeley Farm . . ." and the landlord defendant covenanted with the plaintiff that so long as the rent reserved was paid, the plaintiff shall have quiet enjoyment of the rights and privileges thereby demised without interruption. Later the defendant sold 12 acres out of the farm to a purchaser for building stables for race horses. The grantee of the *profit a prendre* objected to the erection of the buildings by the vendee. In an action for infringement of his rights against the landlord and the purchaser,

Held, that the building on the land would have entirely prevented the exercise of sporting rights over that particular part of the farm. Though the mere building of a stable might not have been, in itself, a breach of the plaintiff's rights under his lease, a complete ouster of the plaintiff from exercising his rights over a definite part of the land would be such a breach, as if threatened, would entitle him to an injunction, and he was, therefore, entitled to have damages granted in lieu of an injunction upon the hypothesis that, as no injunction was granted, the defendants would carry out their threat. It may be that a grant of sporting rights over land which had already been partly developed as building land would not prevent the owner from going on with his plans and building houses from time to time; but a lease of sporting rights over home farm lands stands on a different footing.

CARDIFF REVENUE OFFICER v. CARDIFF ASSESSMENT COMMITTEE, (1931) 1 K.B. 47.

Rates—Rating and Valuation (Apportionment) Act, 1928, Ss. 1, 3, 4—Newspaper printing works and offices—Industrial hereditaments—Meaning of.

The composing, printing and publishing of a newspaper is the making of an article and the adapting of an article for sale and that is done by way of trade or for purposes of gain and

that portion of the newspaper establishment is an industrial hereditament and non-textile factory within the meaning of Rating and Valuation (Apportionment) Act, 1928 and Factory and Workshop Act, 1901. It cannot be said that because the paper serves also for the dissemination of news, in other words, that the object is to provide food for the intellectual faculties of the readers of the newspaper, that its primary purpose is non-industrial.

Those portions of the premises which are not used in connection with the manufacturing process, but for the "editorial part" or managerial and clerical staff, advertisements, etc., which are purposes other than industrial, cannot be said to be industrial hereditaments. Therefore only those portions which were used for industrial purposes are entitled to be proportionately derated under the Act.

In re CARROLL, (1931) 1 K.B. 104: 100 L.J.K.B. 62.

Habeas corpus—Jurisdiction of Court of Appeal—Whether an appellant in Habeas corpus application can be directed to furnish security for costs.

E. C. unsuccessfully applied to Charles, J., in chambers for leave to issue a writ of habeas corpus to produce the body of her infant daughter. Then she applied to the Divisional Court. The respondent's costs in the first application had been taxed but were not paid and therefore they took out this application for security for costs. It was contended that she was applying for a writ of habeas corpus for her child, that she was entitled to make repeated applications for the writ of habeas corpus, that what is pending is not an appeal from the Divisional Court but is an application to the Court of Appeal under its original jurisdiction, and that being so, no order for security can be made.

Held, that the Court of Appeal is not a member of the High Court and that they were not sitting as members of the High Court to the Judges of which repeated applications for the issue of a writ of habeas corpus can be made. The matter was therefore only by way of appeal before the High Court. On the question of security, the mere fact that a person is in poor circumstances does not justify security being ordered where that person is making his first effort to obtain a decision. But Courts allow an impecunious person to get one bite of the cherry but will not allow him a second bite unless he, as appellant, is able to provide security for the costs of the appeal.

THE KING *v.* LAPWORTH, (1931) 1 K.B. 117: 100 L.J.K.B. 52.

Criminal Law—Evidence—Charge against husband of violence against the wife—Wife if a competent and compellable witness for the prosecution.

L was indicted by an indictment charging that he (*i*) attempted to strangle his wife with intent to murder her, and (*ii*) caused grievous bodily harm upon her. The wife was called as a witness by the prosecution but she said that she was unwilling to give evidence. The Judge thereupon compelled her to give evidence and convicted *L* on that.

Held, that the conviction was right. There is no doubt that at common law the husband or wife was always a competent witness in such a case, and by the very nature of things it must have been so, for otherwise, where the assault was committed in secret by one spouse upon the other, there would be no means of proving it. Once it is established that she is a competent witness, it follows that she is a compellable witness.

Leach v. *Rex,* (1912) A.C. 305, distinguished.

OAKLEY *v.* LYSTER, (1931) 1 K.B. 148.

Torts—Conversion—Goods of B *on* A's *land—Assertion by* A *of right to the goods—If conversion.*

A agreed to demolish an aerodrome and to reinstate the land on which it stood but as the pulling down involved the removal of 8,000 tons of hard core and tar macadam, which became *A's* property, he arranged with the tenant of a farm on the opposite side of the road for storing this on his land and dumped the stuff on that land. There were 4,000 tons of the stuff on the land. The defendant purchased the freehold of the farm and wrote to *A* stating that he had purchased the farm and the core stacked thereon and *A* should not therefore attempt to remove the core on the farm. *A* was lawfully in occupation of the land and was the owner of the core and tar but on account of the letter, he lost a purchaser who agreed to buy the whole coal and tar. In an action for damages for conversion, it was contended that *A* was always in possession and was never dispossessed and there was therefore no conversion.

Held, that it is not necessary now for conversion that there should be actual possession by the tortfeasor. Any dealing with goods in a manner inconsistent with the right of the true

owner amounts to a conversion, provided it is established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll,* (1918) 88 L.J.K.B. 601, followed. *England* v. *Cowley,* (1873) L.R. 8 Ex. 126, distinguished.

SLINGSBY AND OTHERS *v.* WESTMINSTER BANK, LTD., (1931) 1 K.B. 173.

Banker—Warrant for interest on war stock—Crossed and marked "& Co. Not negotiable"—If a dividend warrant—If a cross cheque—Bills of Exchange Act, 1882, *Ss.* 82 *and* 95—*Liability of Banker.*

The plaintiff M.E.S., an executor of the will of H.T., received a warrant for 250*l.*, being half year's interest due on 10,000*l.*, 5*l.* per cent. war stock due to the deceased estate. The warrant was in the usual printed form of the Bank of England, crossed "& Co. Not negotiable," and contained a direction to the cashiers of the Bank of England to pay "to the order of M.E.S. (*sic.*) a|c H.T. dec.. of Oxford Road, two hundred and fifty pounds." The payee M.E.S. duly signed the warrant and handed it to the solicitor acting in respect of the estate. *J*, a member of the solicitor firm, unlawfully and without the knowledge and authority of the plaintiffs, handed the said warrant to the defendant Bank with the request that the amount thereof should be credited to the private account of *J* in their Bank. The defendants in due course received payment and credited it to *J's* private account In an action for recovery of that sum from the defendant Bank. the claim was put variously as (*i*) money had and received, (*ii*) damages for conversion of the warrant or the proceeds thereof, and (*iii*) damages for negligence. The Bank manager had an interview with *J* when he asked an explanation for the warrant stating a|c H.T. deceased, but *J* said that M.E.S. preferred to hand over the warrant, because to have given her own cheque would have made it evident that she was probably receiving accommodation from her solicitors. The manager was satisfied with the answer and then acted as he did, especially as there was nothing in *J's* past record to arouse suspicion.

Held, the Bank was protected both under S. 95 as a dividend warrant and under S. 82 as a crossed cheque. It was a cheque, as it was an unconditional order drawn on a banker, payable on demand. The official of the Bank was in drawing

the cheque acting as the agent of the Government and not as a member of the Bank. The cheque was therefore not inter-departmental and so did not take it out of the category of a cheque. (*London City and Midland Bank* v. *Gordon*, (1903) A.C. 240, distinguished.) The cheque was crossed and therefore the banker having acted in good faith and without negligence in receiving payment of the cheque and crediting it to *J's* account, was protected under S. 82. Also, the war stock in question was issued under warrant pursuant to War Loan Act, 1916, to which National Debt Act, 1870, is made applicable. Dividend is there used to signify interest on Government stock and the warrant is therefore a dividend warrant within the meaning of S. 95 of the Bills of Exchange Act, 1882.

REX *v.* LONSDALE, (1931) 1 K.B. 191.

Criminal Law—Two or more accused—Joint trial—Joint trial for proof of habitual criminality also—If valid.

Three persons were charged for breaking and entering a shop with intent to steal to which they pleaded guilty. They were also charged with being habitual criminals to which all pleaded not guilty. Only one counsel represented them all. The three were tried together on the second charge at the suggestion of their counsel, who had then no idea that confusion would result from such trial.

Held, that no two persons should be tried together upon a charge of being habitual criminals. Where two or more persons are included in an indictment for a substantive offence followed by a charge against them as habitual criminals, each should be tried separately on this latter charge, especially where there is likelihood of confusion in identity, etc.

Rex v. *Blake*, (1910) 4 Cr. App. R. 275: 74 J.P. 336, re-established.

Rex v. *Taylor and Coney*, (1910) 5 Cr. App. R. 168. explained.

KENYON *v.* STREET, (1931) 1 K.B. 305.

Shops (Hours of Closing) Act, 1928—*Confectioners' shops—Earlier order prior to Act directing closing of shops earlier than* 8 P.M.—*Order if consistent with the provisions of* 1928 *Act—Conviction under earlier order—If valid.*

By an order made in 1918 under the provisions of the Shops Act, 1912, shops in Irlam were directed to be closed at 8 P.M. on Friday, 9 P.M. on Saturday and 7 P.M. on other days of the week. In 1928 the new Act was passed which laid down by S. 1 that "Every shop shall, save as otherwise provided by this Act, be closed . . . not later than 9 o'clock in the evening on one day in the week . . . and not later than 8 o'clock in the evening on any other day in the week . . ." Section 2 stated "Subject as hereinafter provided, as respects the trade or business of selling table waters, sweets, chocolates, or other sugar confectionery or ice cream, the general closing hours shall be 10 o'clock in the evening on the late day and 9-30 in the evening on any other day" and by the proviso to that section those traders cannot be ordered to close before 8 P.M. Therefore the Act of 1928 expressly took away the power of the local authority to make closure orders at earlier hours. Section 4 says: "Save as in this Act otherwise expressly provided, nothing in this Act shall affect (*a*) any closing order in force at the commencement of this Act, fixing closing hours earlier than the general closing hours fixed by or under the provisions of this Act" and it proceeds "Provided that any closing order, whether made before or after the commencement of this Act, shall be of no effect in so far as it authorises sales after the general closing hours fixed by or under the provisions of this Act, or contains provisions inconsistent with the provisions of this Act."

In a prosecution of a confectioner for selling toffee at 8-40 P.M. in contravention of the order of the Board, dated 1918,

Held, that the order inasmuch as it directed the closing of the confectioners' shops in the area at 7 P.M. was inconsistent with the Act and void under S. 4 proviso and as such the conviction was bad.

HARRIS *v.* HARRIS, (1931) P. 10.

Evidence—Admission to a solicitor by wife—Professional privilege—Admission made at an interview with her about contemplated proceedings for divorce—Solicitor acting for both—Husband and wife—Maintenance.

In defence to a claim made by a wife in a Court of Summary Jurisdiction for maintenance, the husband stated that she was guilty of adultery and admitted that before him. She denied that admission and the husband thereon called a local solicitor to speak to the admission. He had acted as their common

adviser in 1918. In 1919 when there was this delicate situation between the spouses, he saw them both in separate rooms and the admission is alleged to have then been made of the adultery on which the husband relies.

Held, the statement was privileged. The question is what is the relationship of the lay person and the professional man when the lay person confides in the professional man—whether it arises in a case of people who are on opposite sides; or whether it is merely a friendly relationship where, though there may be a breach of personal confidence, there is not a sealed privilege; or whether it is a relationship in which the solicitor is receiving the confidences of an actual or potential client and receiving those confidences under the seal of professional privilege.

STOKE-ON-TRENT REVENUE OFFICER *v.* STOKE-ON-TRENT ASSESSMENT COMMITTEE AND POTTERIES ELECTRIC TRACTION Co., 100 L.J.K.B. 1.

Rates and rating—Industrial hereditament—Elements to be proved by an applicant for derating.

The applicant for derating must show (1) a factory or workshop on some part at least of the hereditament, (2) he need not show that the primary purpose of the hereditament is a factory purpose but should show that the factory work done on the hereditament is so substantial, considering the area, value, and nature of the work done, and the number of people employed, that it cannot be said that the primary purpose of the hereditament is "non-factory." If the factory and non-factory purposes are nearly equally balanced, it is impossible to find one primary purpose. The hereditament is then industrial but there must be apportionment of the annual value of the hereditament under S. 4 of the Act between the industrial and the non-industrial portions of the premises.

In ascertaining the "primary purpose" of the occupation and use, it is the immediate and not the ulterior purpose of the business that is to be looked to under the Act, to determine whether it is industrial and whether in fact that portion of the premises is used for industrial purposes. The use and purpose must be limited to the area of the hereditament. It is not enough that a product made on the hereditament is to be sold or used for non-factory purpose off the hereditament.

Curtis v. *Skinner,* (1906) 95 L.T. 31: 22 T.L.R. 448, dissented from. Case-law and principles elaborately discussed.

The question whether sorting or separation of an article to be sold from a bulk is "adapting for sale" depends on the facts of each particular case. The original bulk may be such that it cannot be sold either legally, or commercially, (because an unsorted bulk is not wanted) and the process of sorting may be so complicated and mechanical as to deserve the title of a manufacturing process that is, of "adapting for sale." On the other hand, the bulk and the article to be sold may be so similar and of such a nature, that the separation or sorting may well be regarded as an entirely minor incident of the sale or distribution.

CARPENTER *v.* HAYMARKET HOTELS, 100 L.J.K.B. 33.

Negligence—Hotel-keeper—Guest—Diamond ring of guest—Loss of—Absence of negligence on guest's part—Liability of hotel-keeper—Notice of warning to guests—Effect of.

A lady and her husband booked a room at the defendant's hotel and went into the room. The plaintiff took out a diamond ring which she had been wearing, placed it in a jewel case, which she put into her suit case. She went out and returned to the bed-room for retiring. The plaintiff did not examine the ring before retiring but next morning she found it was missing and informed the proprietor-defendant about it immediately. There was a notice in the bed-room as well as in the hall of the hotel to the effect that the hotel would not be responsible for any property lost in the hotel and requesting the guests to deposit all articles of value at the office. It was found that the guest was not guilty of negligence and had not so acted as to show that she had retained to herself exclusive protection of her own property so as to relieve the hotel-keeper of liability in that respect.

Held, that the defendant was liable in damages to the extent fixed by the Innkeepers' Liability Act, 1863. "The innkeeper is an insurer of the goods of the guests which are brought to the hotel. He is relieved from the liabilities attaching to that position if the loss is occasioned by the negligence of the guest himself or herself. He is also relieved from the liability as an insurer if a guest so conducts himself in relation to his goods as to show that he has relieved the innkeepers from responsibility for their protection and has undertaken the protection himself."

Jones v. *Jackson,* (1873) 29 L.T. 399, distinguished.

R. *v.* CORRIGAN, 100 L.J.K.B. 55.

Extradition—Criminal Law—Extradited person whether triable only for offences for which extradited—Treaty between Great Britain and France—Onus of proving extradition.

The accused was arrested in Paris on a warrant issued by a Magistrate in Great Britain on charges of obtaining sums of money by false pretences and brought before a French Court. The accused made five appearances there and was then sent in custody to Boulogne where he was handed over to a British Police Officer. The French Government wrote to the British Government stating that the accused consented to be sent back without the fulfilment or accomplishment of the formalities of extradition. He was tried on the same facts as those contained in the informations on which the warrants for the arrest of the accused were granted, but convicted not for obtaining money by false pretences but for fraudulent conversion.

By S. 19 of the Extradition Act of 1870 "Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded"; and by Art. 4 of the Treaty Act of 1876, "a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender has been granted."

Held, S. 19 of Act of 1870 is not repealed by Art. 4 of the treaty between England and France and therefore the conviction for fraudulent conversion on the facts contained in the information and depositions was valid. The onus of proving that extradition proceedings were taken against the accused and that he was surrendered under the Extradition Law is upon the accused. In the absence of evidence of such surrender, the finding that he returned voluntarily although in custody is correct, and he must face in this country any charges made against him.

WILLIAM LEITCH & CO. *v.* LEYDON. A. G. BARR & CO. *v.* MACGEOGHEGAN, 100 L.J.P.C. 10.

Torts—Trespass—Goods—Bottles of A*—Given to* B *his customers for use and return—*B *taking it to* C *for filling up aerated waters—Property continuing in* A*—If* C *can be restrained by injunction from filling it up.*

The appellant company were manufacturers of aerated waters, which they sell to traders and others in bottles and syphons, the terms of the sale being that the property in the bottles and syphons remains with the appellants, to whom their customers are bound to restore them. The customers leave a deposit with the appellants to ensure their return. The purchasers of these bottles, having emptied them of their original contents, seek to have them refilled, which they can do by a simple process at the shop of any one who possesses a soda machine similar to the one possessed by the respondent. When these bottles are so taken to them, the respondents fill up the bottles for their customers, without looking at the bottle to see the name of the appellant company is embossed on it. The appellant company seeks to restrain the respondents from filling up their bottles with aerated water at their "Vantas" fountain, on the ground that the bottles are their property. Notices are given to their immediate customers by the appellant company that the property in the bottles continues with them.

Held, that assuming that the appellants can claim from any purchaser of the bottle the restoration of the bottle and forbid him using it for any purpose at all, it still does not follow that they are entitled to obtain the injunction they seek against the respondent. The respondent does no more than fill whatever receptacle is offered to him. It may be that the person presenting may be, to the respondent's knowledge, under contractual obligation to the appellant either as to its return or its use, but to that contract the respondent is not a party and it is a novelty to say that *A* can be compelled by law to do or refrain from doing something lawful in itself and that to his own prejudice, in order to help *B* to enforce his contract with *C*. The member of the public who produces the bottle is in lawful possession of the bottle and remains in such possession notwithstanding that for the purpose of filling up he temporarily transfers the manual custody to the respondent.

JOTTINGS AND CUTTINGS.

The Judicial Committee and Extradition Cases.—The Judicial Committee has laid down repeatedly and emphatically that it will not interfere with the judgment of a Colonial Court in a criminal case unless it is satisfied that there was something in the proceedings which deprives the accused of the substance of a fair trial, and causes substantial and grave injustice. That principle was affirmed last year in the case of *Knowles* v. *The King,* when it granted leave to appeal; and in a series of applications from the Palestine Courts in connection with the riots of August, 1929, when it refused leave to appeal. It is striking, therefore, that the Committee granted leave to appeal recently from an order of the Supreme Court of Trinidad in *Habeas Corpus* proceedings which were brought to test the validity of the extradition of certain prisoners who had escaped from the French Penal Settlement of Cayenne, commonly known as Devil's Island: *Kossekechatko and others* v. *Attorney-General for Trinidad,* (Times, 24th ultimo). Their order indicates that a *prima facie* case of grave injustice or lack of jurisdiction has been made out, which will have to be argued on the substantive appeal. It is very rare for them to give leave in extradition cases, though in 1923 they granted an application in a case which raised the question of the nationality of the inhabitants of Palestine: *Goralschvili* v. *Attorney-General for Palestine.* But the governing principles are the same as those laid down for criminal appeals. In the present case the main ground put forward by the petitioners was that the Magistrate in Trinidad had no evidence before him that the crimes for which they were convicted in France were committed in French Territory, while the Anglo-French extradition treaty provides for the surrender of persons convicted of crimes committed in the territory of the other party. It was urged also that the request for their extradition had not been made within 14 days of their arrest in Trinidad, as required by the Treaty, and that the warrant of commitment was altogether bad in form. The grant of the application will involve further examination by the Committee of the Principles of Extradition Law, which have recently been elucidated by the High Court in the *Corrigan* case.—*L.J.,* 1931, p. 92.

Lawyers and the New Thing.—Sir John Withers' views on the reluctance of the solicitors (as a body) to initiate constructive measures of reform might have been extended to

other branches of the profession. With barristers and judges, as with solicitors, what was good enough for their fathers has (generally) been good enough for them. When old-fashioned lawyers awoke to the fact that plaintiffs and defendants were to be allowed to give evidence on their own behalf, they were filled with apprehension and alarm. And when the Prisoners' Counsel Bill was being discussed in the House of Commons, Park, J., was so disgusted with its provisions that he wrote to the Attorney-General, Sir John Campbell, threatening that if the measure were passed he would immediately resign. Something must have occurred to change his views, for the Bill was passed and the stern resolve was not fulfilled. Park, J., carried on until he died in harness in 1838.

Lord Campbell, in his diary, expresses the opinion that Bills for abolishing the Star Chamber, for prohibiting torture, or for allowing the prisoner's witnesses to be examined on oath, would all have been strenuously opposed by Lords Eldon, Redesdale and Tenterden. Twelve of the fifteen Judges in 1837 were against the Prisoners' Counsel Bill.—*L.J.*, 1931, p. 103.

Law and the University.—In referring recently (*ante*, p. 91) to an interesting judgment of Chief Judge Cardozo of New York as to the liability of accountants, we omitted to notice that upon him fell the duty of delivering the address last September when the honorary degree of LL.D. was conferred by Columbia University on Lord Dunedin and other distinguished lawyers, and his address is printed in the current number of the *Law Quarterly Review.* Whether it is true, as he said, that the function of a University is to treat law imaginatively, we are not sure, though it suggests a pleasing distinction between the class-room, and the drier atmosphere of office or chambers and the Courts, where the student will have to reduce imagination to practise. But the Chief Judge paid a welcome compliment to the merits of English judgments. "What a faculty they show for using the right word, for bringing the law down to earth by clothing its mysterious precepts in the garb of homely truths." And to continue the quotation:

> "Even our tariff walls have left a gap for the importation of these luxuries of foreign make, and this though there has been some departure on the other side from the rule of reciprocity. Citation of our precedents, though not forbidden in the English Courts, is still, if I mistake not, a practice gently frowned upon, or at least not noticeably encouraged."

Probably this reproof, so gracefully put, does represent the tendency of the Courts here as regards citation of American

decisions; but this is due to the enormous growth of the volume of judicial precedents—in the United States on a scale still greater than here—rather than to any failure to appreciate their value. And when occasion arises, the decisions of the American Courts are cited and are welcomed as having a strong persuasive force, though not actually binding as precedents. But though it is not practicable to make use of all the available material, yet, as Chief Judge Cardozo said, this judicial making of law forms a bond between American and British lawyers, and he discerns a similar development in French and German jurisprudence.—*L.J.*, 1931, p. 128.

Audi Alteram Partem.—Lawyers must have rubbed their eyes in some amazement when they read the report of the hearing of an application in the Court of Appeal on Monday in *Re the Application of Nicholson and Sons, Ltd.* (*Times*, February 17). Messrs. Nicholson had succeeded, in the course of prolonged litigation between themselves and Bass, Ratcliff and Gretton, Ltd., in establishing their right to the registration of a black and white triangle as a trade mark; but Bass and Co. were given liberty to apply that registration of Nicholson's mark should only be allowed with certain restrictions. This application came before the Court of Appeal last Monday, when counsel for Bass and Co., asked that the use of Nicholson's mark should be restricted to beer sold in barrels. The application was dismissed without counsel for Messrs. Nicholson being called on to argue. There is, of course, nothing remarkable in that fact by itself; it happens almost every day. But what appears to us to be unusual is that the Court was not unanimous on the point, and that the Master of the Rolls, who dissented from the opinion of his colleagues, delivered a judgment in favour of Bass & Co. in spite of the fact the Nicholson & Sons' counsel had not been heard. Since the majority of the Court was of the opinion that the application ought to fail, the result of the case was not affected, but that does not alter the fact that, as the case is reported, a judicial opinion was expressed in favour of one of two litigants without the contentions of the other having been heard. With the greatest respect, we express the hope that this precedent will not be followed.—*L.J.*, 1931, p. 128.

The Pursuit of Health.—It so happened that the visit of the British Medical Association to America coincided with the visit of the British lawyers, and from one of the addresses, of

which a reprint is before us, we rather imagine that the doctors had even a better time than the lawyers. It was delivered by Dr. Robert Hutchinson, a well-known London Physician, at the combined meetings of the British and Canadian Medical Associations at Winnipeg on August 27, and professed to be "popular;" so perhaps it is hardly a sample of the discourses which formed the staple entertainment. Indeed, it is so popular that its appeal is no less to lawyers and to people generally than to their medical advisers. It sorted out the various forms of hypochrondriasis—individual, vicarious, and national. Dr. Hutchinson does not believe in any of them—over-care as to one's own health, the family health, or the national health—but is all for natural living. Scientific living is, it seems, carried so far that in some American restaurants the caloric value of each dish is entered on the menu. And when people are tired of calories, they are crazy about vitamins or about "roughage." But for Dr. Hutchinson the scientific truth about all this diet business is "Eat moderately, take an ordinary mixed diet, and don't worry about anything else." Another form of individual hypochondriasis, he says, is found in the physical fitness people. "They are the sort of people who do physical jerks to wireless accompaniment," but Dr. Hutchinson quotes "your Canadian humorist," Prof. Leacock, as saying that after all their fears about diet and exercise, "they presently incur some simple old-fashioned illness and die like anybody else." And Dr. Hutchinson is equally critical of fussiness about the health of others, and fussiness about the health of the community. But we have already wandered from our province. It is true, he concludes, "in the bodily, as well as in the spiritual sphere, that he that will save his life shall lose it." Canada is a large country, and no doubt the British lawyers did not know what was going on among the doctors at Winnipeg. In missing Dr. Hutchinson's "Pursuit of Health," they missed a good thing.—*L.J.*, 1931, p. 129.

New Silks.—Mr. Bhugwandin Dube who was called to the Bar at Middle Temple, on July 1, 1908, has practised almost exclusively in the Privy Council in Indian Appeals; and the Lords of Appeal, who know him well, did not fail, through the mouth of Lord Macmillan, to express their pleasure at his promotion. Apparently a unique distinction, since, according to Lord Dunedin, Mr. Dube is the first and only Indian to receive the honour of a silk gown.

Apart from him, this batch of eleven silks is free from thrills, and not one name can be regarded as a "household word," even in the limited families of the lawyers. Messrs. Bucknill, Trapnell and Turner have been fairly busy as juniors, and have reasonable expectations of substantial employment within the Bar. It is thought that Mr. Turner may succeed to much of the work released by Mr. Rowand Harker's withdrawal from the Parliamentary Bar; Mr. Inman, in building contract cases, may inherit much of the extensive practice of the late A. A. Hudson, K.C.; while Mr. Daynes, of the Chancery Bar, one of the best and busiest juniors on that side, is regarded as certain to secure full-time continuous employment as a silk.—*L.J.*, 1931, p. 136.

Applying for Silk.—I have heard much adverse criticism, spoken in the Temple during the past week, concerning that ancient and now undesirable practice which requires a junior, when he is about to apply to the Lord Chancellor for silk, to notify all those on his circuit who were called to the Bar before him. Some years ago standing and respectability were all that were deemed to be necessary to ensure that a request for silk would be granted almost as a matter of course; but for some time this has not been so; and of late one has to indulge in wild surmise to find a reason for the fact that, while many apply, a few are not chosen.

Twenty-five years ago there was much grumbling because of surprising omissions from the successful list; when men not only of sufficient age and unblemished reputation, but of large practice, were passed over. As a result of the practice aforesaid every one knew they had sought silk but had not found it; and that their reasonabe request had become painful by this publicity.

It is not beyond the wit of lawyers to devise some means whereby the intentions of the Lord Chancellor could be ascertained, in the event of an application by a particular person.—*L.J.*, 1931, p. 153.

When few were chosen.—A century ago the honour of a silk gown was sparingly and often grudgingly granted. In the early part of the nineteenth century the leaders of the Bar were few in number, a select body, into which it was extremely dif ficult to gain admittance. However distinguished a junior might be, however large his practice, if he did not see eye to

eye with the reigning Lord Chancellor, his chances of selection were exceeding small. Sometimes even higher influences were at work against him. A classical quotation wherewith Denman embellished his speech at the Queen's trial, aroused such anger in the breast of King George IV that it needed all the persistence of the Iron Duke to secure a patent of precedence for the future Lord Chief Justice in the year 1829. The Duke afterwards declared with a characteristic oath that "it was the toughest job he had ever had."

And the great Campbell applied for silk in vain to Lord Eldon in 1819. He had to wait for eight years before Lord Lyndhurst took pity on him and called him within the Bar.

Times changed. Lord Halsbury, when his Government went out of office in 1906, had created, during his times as Chancellor, more than two hundred silks.—*L.J.*, 1931, p. 153.

Police Work as a Profession.—Each year for several years, Sir Leonard Dunning, in his annual report as one of H. M. Inspectors of Constabulary, has condemned in no uncertain terms the practice of "tipping" members of police forces not only as being harmful in itself, but as being degrading to a body of men, each of whom has the opportunity, and should have the desire, of raising to a position of high responsibility in the force; and in his report for the year ending September, 1930, he not unnaturally makes the suggestion of a Police College, at which training for the higher ranks of the service would be systematised somewhat on the lines of the Staff College for the Army, a peg on which to hang his familiar argument. We entirely share Sir Leonard's views as to the undesirability of "tipping" the police; but the practice will only be stopped by the refusal of members of the force to accept gratuities, for the habit of rewarding in this way small personal services, such as the police constantly render, has become ingrained in the public, and only the knowledge that the offer of a tip will be regarded as an indignity will put an end to the practice. Major-General Atcherley, the other Inspector of Constabulary, calls attention to the fact that the constantly increasing requirements of police for traffic control adversely affects the numbers available for patrol duty, and he has the impression that the cumulative effects of present-day demands on the police are beginning adversely to affect efficiency. There seems to be little likelihood that the number of police required for traffic control purposes will become less in the near future, although automatic traffic signals may do something in this

direction; and the various establishments should be revised to ensure that a sufficient number of men are available for patrol duty. It is, perhaps, a tribute to the law-abiding instincts of the citizens of this country that the present strength of the police for a population of thirty-eight millions is under 58,000.—*L.J.*, 1931, p. 160.

The Malta Royal Commission.—The Royal Commission which is to visit Malta and report on its political affairs will have an interesting, and difficult, task to discharge. The main object of the visit is to discuss and suggest ways and means for the restoration of the Constitution of 1921, which has been in abeyance for some nine months. The friends of constitutional government (amongst which lawyers are, as a whole, to be found) must hope that the Commission will find the correct solution. It is impossible, in view of the known facts, that the spirtitual guides and advisers of a devout race should exercise no influence in public affairs, and the difficulty will be to devise a means by which, consistently with that influence, electors may be "free and independent." On one point lawyers may insist, namely, that the Courts must be inviolable in the exercise of their proper jurisdiction. The final collapse last year was precipitated by the issue of an Ordinance depriving them of that jurisdiction. This Ordinance the Court of Appeal ignored—only to find itself overruled by the strong hand of the Secretary of State. The spectacle was shocking to the legal mind; and, indeed, it may be said that no form of democracy can subsist unless the independence of the Judges enjoys absolute protection. The solution of the problem must now await the report of the Commission. The delay is to be regretted, but, in the circumstances, is inevitable.—*L.J.*, 1931, p. 161.

Murderers as Beneficiaries.—A somewhat singular question of the application of the rule that a person who commits murder cannot take a benefit under the will of the murdered person came before Mr. Justice Farwell in *Re Pitts*: *Cox* v. *Kilsby*, (*Times*, February 26); but on the facts found by the learned Judge it did not become necessary expressly to decide it. A husband shot his wife and infant child and committed suicide. The wife died intestate, and the question of fact was as to whether at the time of the commission of the act of murder he was insane or not. The coroner's jury had found that the husband murdered his wife and child, and that he committed suicide whilst of unsound mind. They do not appear to have

expressly found that he was insane at the time of the murders, and it is, of course, possible that a sane man might commit murder and, being overcome by horror at his deed, become insane and commit suicide. But, having regard to *Bird* v. *Keep*, (1918) 2 K.B. 692, the verdict of the coroner's jury was not evidence in the case before Mr. Justice Farwell, and he heard evidence on the question of sanity, coming to the conclusion that the husband was insane when he committed the murders. That being so, he was not a murderer, for the purpose of the rule which prohibits a murderer from taking under the will of the person murdered, and the question of whether it applied to a case in which the murdered person died intestate did not arise, though the learned Judge thought, without deciding the point, that it would. In the result, the husband's estate was entitled to the share of a surviving spouse under the Administration of Estates Act, 1925, and also, since the presumption was that the child survived the mother, to the estate of the child.—*L.J.*, 1931, p. 161.

Judicial Salaries in Belfast and Dublin.—If merit has been measured in sterling, it would appear that, man for man, the Judges of Belfast are better than their Dublin counterparts. Moore, L.C.J., of Northern Ireland, is rewarded by a salary of 5,000*l* a year; Kennedy, C.J., of the Irish Free State, receives a beggarly 4,000*l*; Andrews and Best, L.J J., are valued at 4,000*l*. yearly; President Sullivan, and the Judges of the Supreme Court, the Honourable FitzGibbon and Murnaghan, whose duties correspond to those of the L.J.J. aforesaid, are mere 3,000*l*. men; while the "puisnes," the Honourables Creed Meredith, Wylie, Johnston, Hanna and O'Byrne, of the Cuist Oachtarach, receive each no more than 2,500*l*. a year. Their counterparts in Northern Ireland, Wilson and Brown, JJ., are paid a thousand more.

The cause of the discrepancies may be other than mere merit. My suggestion for the increasing of peace and harmony throughout Ireland is that Dublin should follow, nay, should excel Belfast; but may be the Free State cannot, or will not, rise to it.—*L.J.*, 1931, p. 175.

Two Unwanted Institutions.—In vain did England try in 1873 and after to effect a merger of common law and equity; they refused to merge; and so in London there are six specialists in continuous session (barring illness) in the Courts of

Chancery; a crowd of barristers, conveyancers, and equity specialists congregated in one of the inns, namely, Lincoln's Inn. Our County Court judges have, within their limited jurisdiction, to decide questions of law and equity. But in England there are the judgments of the specialists for guidance, and an appeal to a Court where a Chancery Judge is almost sure to be on the Bench.

In Northern Ireland, as in the Dominions, the same High Court Judges deal with every branch of the law, and neither there nor elsewhere throughout the British Commonwealth of Nations is there any loud demand for Courts of Chancery on the Fleet Street model.—*L.J.*, 1931, p. 175.

University Representation.—Without going too far into politics, we may express our satisfaction that the House of Commons has rejected the clause in the representation of the People Bill which would have abolished the representation of the Universities. It may be difficult to estimate exactly the beneficial effect of such representation on the House of Commons, just as it is difficult to estimate exactly the effect of other elements in popular representation. But in no department of social life is a dead level of uniformity desirable, and if only in a small degree, university representation breaks the uniformity of electoral areas. This, of course, in itself is not a sufficient argument; the uniformity must be broken in the right direction. University representation answers this test. Whether or not the University vote has always selected the best men, and even if it has been mainly exercised in favour of one political party, at least it forms a bond between Parliament, where the practical conduct of the affairs of the nation is centred, and the institutions which are dedicated to the encouragement and pursuit of learning. As we have said, the direct influence of the University members in Parliament may not be great, but they form a very useful element in that assembly, with special knowledge available on matters relating to education, and their presence is a reminder that the Universities, as much as the great agricultural and industrial areas, are an essential part of the Commonwealth.—*L.J.*, 1931, p. 195.

Donations Mortis Causa.—Donations *mortis causa,* said Lord Hardwicke in *Ward* v. *Turner,* (2 Ves. section 431), "are undoubtedly taken from the civil law; but not to be allowed of here farther than the civil law on that head has been received and allowed." But though such is the origin of these

gifts, the conditions under which they will be effective have long been settled in English law. They are, that the gift must be made in contemplation of death; it must be intended to be absolute only in case of death; that is, the thing is to revert to the donor should he recover; and there must be delivery of the subject-matter of the gift. Questions have usually arisen with regard to the sufficiency of delivery, as in the case of a cheque which has not been presented and honoured in the donor's lifetime, such a gift being void: *Re, Swinburne,* (1926) Ch. 38: 95 L.J. Ch. 104; or of a parcel of bonds deposited in a box at a bank; in this case, the delivery of the key with a list of the bonds was sufficient: *Re Wasserberg,* (1915) 1 Ch. 195: 84 L.J. Ch. 214. In *Wilkes* v. *Allinson,* (1931) W.N. 76, before Lord Tomlin, the question arose as to the correctness of a statement in *Williams on Executors,* (12th Edn., p. 479), that the gift must be conditioned to take effect only on the death of the donor from his existing disorder. The donor was suffering from a disease which he knew must before long terminate fatally, but in fact he caught a chill and died from pneumonia. Lord Tomlin held the statement to be incorrect. It was enough that the gift was made in contemplation of death, without regard to the way in which death actually occurred.—*L.J.,* 1931, p. 197.

A Screen of Oblivion.—As we go to press we note the decision of the President on a motion to strike out such paragraphs in a husband respondent's answer to his wife's petition as alleged misconduct before the date of a separation deed between the parties. The husband alleged that he had been ignorant of such misconduct. The deed contained a clause commonly known as a "*Rose* v. *Rose clause,*" which, *inter alia,* purports to condone all antecedent offences and provides that if either party shall commence proceedings against the other in respect of any subsequent cause of complaint no offence or misconduct committed before the date of the deed "shall be pleaded or alleged by either party or be admissible in evidence." The deed was dated the 15th November, 1929, and on the 13th August, 1930 the wife instituted proceedings for divorce based on allegations of adultery on two days in August at the Savoy Hotel with a named woman. The woman put in no defence, but on the 6th November, 1930 the husband put in a defence consisting of a denial and an allegation that the petitioner had committed adultery before the date of the deed with a man who had since died. Counsel for the husband urged that the clause

in question was against public policy, as it would enable parties who had led profligate lives and desired a collusive divorce to set up a "screen of oblivion" and next day the husband could go to an hotel and commit adultery on which the wife could found her petition.—*L.T.*, 1931, p. 134.

The Decision.—The President, in giving judgment, said that the matter had been fully argued, but as he had formed a definite view he would give judgment at once. The real question was whether, assuming their intentions were honest, the deed was binding on the parties. It was contended on behalf of the respondent that the clause was against public policy as the jurisdiction in divorce was not exercised simply between suitors but involved questions of public policy. It was not disputed that *Rose* v. *Rose*—a decision of the Court of Appeal—was in point, but it was said that in that case the question of public policy was not raised. In *Rowley* v. *Rowley*, in which there was an attempt to go behind an agreement of oblivion, the House of Lords affirmed the decision that the agreement furnished an absolute bar to the allegation of matters arising before its date. In that case, too, it was said that the question of public policy had not been raised, but Lord Penzance in his judgment dealt with the question. The proposition that parties could not lawfully enter into such an agreement because if one began proceedings for a divorce the other was under a duty to put before the Court all facts relative to the proper exercise of its discretion was a very large one. It would render impossible all attempts at reconciliation, as no reconciliation could be final. The difficulty was said to arise by reason of the proviso to sub-S. (3) of S. 178 of the Supreme Court of Judicature (Consolidation) Act 1925, which provided that the Court should not be bound to pronounce a decree of divorce if it found that the petitioner had during the marriage been guilty of adultery. No one was bound to petition for divorce. Had one who became a party to divorce proceedings a duty laid which would make this deed invalid? The only ground for holding the deed void would be that it embodied a scheme to deceive the Court, and looking at the agreement and assuming that the parties were desirous not of deceiving the Court, but of regulating their lives by its terms, was it void because it might be used as a cloak of evil? In his view the agreement was perfectly good, and the authorities of the last fifty years supported that view.—*L.T.*, 1931, p. 134.

Legal Families.—In the sketch of Chief Baron Pollock in the late Mr. Edward Manson's Builders of the Law, it is said that "the Pollocks are the *Mucian gens* of England, a race of hereditary lawyers. Law is in their blood, like literature in that of the Coleridges, politics of the Pitts, music of the Mendelssohns." True, the Pollocks have been represented on the bench by three generations although not in a direct line, but their record has been beaten by the Coleridges, of whom three in a direct line reached the bench of the Supreme Court. A parallel to this was seen in Scotland where three generations of the Moncreiff family were judges of the Court of Session. A more curious instance of relations occupying the judicial seat is recalled by a letter in *The Times* last week, where it is pointed out that about the middle of the nineteenth century there were on the bench of the Court of Session at the same time three brothers-in-law, namely, Lord Fullerton, Lord Cockburn, and Lord Dundrennan, who were married to three sisters. When the third of the three took his seat Lord Cockburn noted the fact in his Journal, and, after mentioning the circumstances that Dundrennan was the third brother-in-law to be promoted, expressed the hope that he would be "the last who will have the infirmity of changing his own name (which was Thomas Maitland) and taking that of his clods on mounting the judgment seat." The hope thus expressed has not been realised, for several of the present judges of the Court of Session continue the old tradition of taking for judicial purposes a territorial title.

In England, so far as the present writer can recall, there has been no exact parallel to the Scottish instance of three judges on the bench at the same time all having married sisters and thus making quite a family party, but we have got very near it. The present Lord Russell of Killowen and Lord Justice Romer married sisters, while Mr. Justice Maugham married a sister of Lord Justice Romer, so that the latter can say that he has two brothers-in-law on the bench with him.—*L.T.*, 1931, p. 148.

Index Oddities.—Every lawyer realises the value of a good index; indeed, without one his labour in consulting his books is multiplied a hundredfold. Little, however, does he realise that indexing is something of an art and that it cannot be devolved upon any one with success. Too often is this forgotten with disastrous results. Occasionally, it is true, the indexer gives play to his sense of humour to the delectation of the

judicious but to the perturbation of those with no perception of the ludicrous. Thus, in some of the earlier editions of Smith's Leading Cases a humorist was obviously at work, for there we find such entries as: "Hawk's Eyes, Court will not always look with"; and "Hull, J., swore on the bench." But in the majority of cases it is to be feared that the humour is altogether unconscious on the part of the indexer as it was with Sir Gregory Lewin, who plentifully sprinkled the index of his reports of Crown cases with such entries as these: "Backway —a person attacked ought to escape by, if he knows it"; "Lifting up—a bag from the boot of a coach is an asportation"; "Labour—medical man neglecting a woman in, is manslaughter"; "Slinging a cask negligently—manslaughter." Occasionally an error in punctuation turns an entry into something very different from what was intended. Of this a striking example is furnished by the index to the life of the late Lord Gorell, where the reader may find this: "Gladstone, speech on divorce of." The entry would have been in accordance with the subject-matter in the text if a comma had been placed after the word "divorce" and would have avoided an awkward ambiguity. Another recent legal biography, that of Lord James of Hereford, has a curious and amusing entry in the index. Under the heading "James, Henry, Lord, of Hereford," we find a brief notice of the leading incidents of his career, and among them may be noticed the following: "Attacks Gladstone 216-17; Attacks of gout 217-18." The collocation of the two kinds of attack is piquant.—*L.T.*, 1931, p. 148.

Divorce Witnesses.—Another expression of opinion in favour of simplification of legal procedure has come recently from Mr. Justice McCardie, who had before him at the Sussex Assizes last week a number of undefended divorce cases for each of which several witnesses had been called. If he is reported correctly the learned Judge took occasion to regret "the perfectly appalling waste of time and money involved in calling witnesses from the north, south, east and west of England to prove facts about which there was not the faintest measure of dispute," and suggested that they could have been proved by affidavits without the slightest difficulty. His Lordship is then reported as saying that in his view the laws of England with respect to evidence were old-fashioned and out-of-date and the time was coming when they must be amended. It is true that divorce petitions consume a great deal of the time of Judges both

in London and on assize, and it is true also that much of the work on the undefended list is more or less of a routine character. It is not overlooked that a distinction was drawn by Mr. Justice McCardie between the presence of the petitioner and that of the witnesses, but even so, we are not, with all due respect, altogether convinced that undefended divorce causes, with their admitted proportion of "arranged" suits, afford as strong an argument for the substitution of affidavit evidence as some others where the issues are less important socially. For similar reasons we are not in agreement with the suggestion, more than once put forward, that undefended divorce should be handed over to a registrar or other experienced official, for that way lies an invitation to perfunctoriness and that disregard for truth of which His Lordship so bitterly complains. That divorce should be easy in the sense of not being inaccessible is right; that it should be informal seems undesirable.—*L.T.*, 1931, p. 242.

A Company Wholly "Held."—Sixty or seventy years ago, the notion that one company could or should be a shareholder in another was something of a novelty, and it was actually argued in Re *Barned's Banking Co.*, (1867) L.R. 3 Ch. 105, that for one company to invest in the shares of another was *ultra vires*. Lord Cairns, however, observed (p. 113) that he knew of no reason at common law why one corporate body should not become a member of another, and held that the Companies Act, 1862, in fact, permitted such a relation in the case of limited companies. Since then, of course, the practice of one company holding shares in another has enormously increased, and "holding companies" have been created for this express purpose. The question of the legal position when one company holds every single share of another may thus be of practical interest. The latter company then has only one member within section 25 of the Companies Act, 1929, and to say that in such circumstances the prescribed annual general "meeting" can be held is somewhat a strain of language, for section 116 (1) (*a*) allows only one person to represent a company. The point is discussed in *East* v. *Bennett Brothers, Ltd.*, (1911) 1 Ch. 163, where the memorandum and articles required meetings of preference shareholders, and one person held all the shares of that class. Warrington, J., decided that the situation was within the constitution of the company, and, if that one person signified his wishes in the proper formal manner, he could "meet" within the articles to do so. It is perhaps unnecessary to add

that these articles did not require a quorum at such a meeting. The position when an individual or a company holds all of one particular class of shares may, however, be distinguished from that when all of every class of share are so held, either by an individual or another company. In each case the company so held could be wound up on an application under section 168 (3) of the Act, and, if the holder was a single individual, probably would be. If the holder was a company, it might be submitted that the case was not within the mischief of the implied prohibition on single ownership—a prohibition which, even in the case of an individual owner, has been much more a matter of form than substance since the *Solomon Case,* (1897) A.C. 22. On the whole, it would probably be better, if only out of respect to the law as framed, for nominees to hold sufficient shares to form a quorum and comply with the Act. The intelligent student might perhaps exercise himself with the problem of what would happen if *A* company held all *B* company's shares and *vice versa,* or *A* held *B's, B* held *C's,* and *C* held *A's.* It would be something like the snakes all eating each other's tails. The one certainty would be that, given such a situation, various company promoters could, under the old law, have framed plausible balance sheets to show that each of a number of insolvent companies was worth millions. Whether sections 125-127 of the new Act will now prevent such artifices remains to be seen.—*S.J.,* 1931, p. 106.

Violence in Court.—Few of us, in our most uncontrolled moments, would be courageously indiscreet enough, even under great provocation, to shatter by physical violence that peculiarly unruffled atmosphere which invariably characterises our civil and criminal Courts. The customary quiet dignity of the proceedings, in association with the invisible but iron hand of power that lies beneath, rarely fails to exercise a salutary, restraining influence over the most hardened offender or the most bumptious litigant. Tense, conflicting emotions there must be in this school where most of the passions with which humanity is afflicted are exposed, but seldom does anger rise to such a pitch that actual physical violence is directed to the Judge or other officer of the Court. This country, perhaps more than any other, although by no means completely exempt, has been remarkably free from this unpleasant class of outrage. By a Home Office Order, rigorously enforced, all prisoners are now thoroughly searched before being placed in the dock. This obviously necessary precaution, which began twenty-five years

ago, resulted from a prisoner in the Crown Court at Leeds hurling a bottle at the Recorder, who narrowly escaped serious injury. By a remarkable coincidence the same man was again sentenced recently in the same Court, and on this occasion he was strongly guarded in the dock by four warders. Judge Cluer, not long ago, sent to prison for seven days a witness who, it was alleged, had struck an usher on the face; while from Brighton comes the case of a man kicking another who had given evidence against him. These comparatively trivial offences are merely petty, though none the less objectionable exhibitions of temper which ought to be controlled, but cause no particular harm except, perhaps, to the perpetrators, who thereby expose themselves to the penalties for contempt of Court. Far more serious was the attempt by a lunatic to shoot Sir George Jessel; luckily, he missed. Then there was the ink-stand hurled from the dock at a Recorder, Sir Arthur Collins, who had just sentenced a burly ruffian to seven years' penal servitude; happily, that too missed its mark. "That must have been meant for my brother Bacon," said Vice-Chancellor Mallins, humorously, on one occasion, when a none too excellent egg just missed him and besmeared the judicial bench. The whole basis of the Court's refusal to tolerate an act of physical violence or other attempt at revenge or intimidation is, of course, to ensure that there is no interference in any way with the due administration of justice. "It is on that ground, and that alone," said one Judge towards the end of last century, " and not on any exaggerated notion of the dignity of individuals that insults to judges, witnesses or jurymen are not allowed." The most recent case of violence in Court comes from Edmonton (N.) County Court, where a scuffle took place at the back of the Court between the parties in a case. For a few minutes four men and a woman struggled together. Judge Crawford gave orders that the police should be called to eject the combatants, but he was told that the police were not on duty in the Court. That information not unnaturally drew a strong protest from him: "It is really shameful," he said, "that Courts of this importance should be deprived of police assistance, and that scenes like this should be allowed in a court of justice."—*S.J.*, 1931, p. 143.

A Legal Classic.—In the address to which we last week drew attention, Lord Macmillan, while advising the young lawyer to study literature as an aid to the efficient discharge of his professional duties, in no way, of course, seeks to minimise

the importance, nay, the necessity, of mastering, as far as this can be done, the immense field of the common law. What he does is to enter a caveat against a too complete absorption in the study of the law to the exclusion of all else. "The lawyer," he says, "does well from time to time to lift his eyes from his desk and look out of the window on the wider world beyond." He does not commend the example of Chief Baron Palles, who is said to have taken Fearne on "Contingent Remainders" with him for reading on his honeymoon. Fearne's treatise is one of the classics of the law; Mr. Augustine Birrell speaks of it as "a masterly performance (considered by some the best law book ever written)," but we suppose that there are few in these days who could truthfully adapt the language of Mr. Silas Wegg and say that they have been "right slap through Mr. Fearne lately." Even the greatest law books become obsolete or obsolescent; they have had their day and have ceased to be; but few, even in the days when "Contingent Remainders" was in constant practical use have been so enamoured of its charm as to emulate the example of Chief Baron Palles and carry it with them for reading on their honeymoon.—*S.J.*, 1931, p. 144.

Strangers in the House.—The incident last week when a Member of Parliament "spied strangers" and had a solitary survivor turned out of the gallery of the House of Commons seems somewhat of an anachronism in these days when the fierce light of publicity beats upon all that takes place at St. Stephen's. At one time, and that not so far distant, motions for the exclusion of strangers were of frequent occurrence, the House watching with great jealousy any infraction of the rule by which no one other than a member was allowed access to its precincts. For this attitude there may have been grounds in days when it occasionally happened that a stranger pushed his way into the floor of the House, for we are told that as late as 1771 a stranger was actually counted in a division. Again, reports, by which alone most of us get our information regarding proceedings in Parliament, were severely frowned upon, and, as we all know, there ensued a long and bitter struggle before newspapers obtained recognition in a gallery of their own—a struggle which has a constitutional importance. Now-a-days, the exclusion of strangers is, happily, of rare occurrence, and is as a rule resorted to only if those admitted to the gallery are guilty of some breach of the rules. It appears that strangers are, nominally at least, under very strict regulation; thus,

no member of the public may read a book or newspaper there; apparently he is expected to give his whole attention to the proceedings taking place on the floor of the House. It may be added that the prohibition against the reading of newspapers is not confined to the House of Commons. We are told in the late Mr. Oswald's treatise on "Contempt of Court," that "it is not respectful to the Court to read newspapers, however respectable, at the bar in view of the Judge;" the parenthesis is delicious. More than once the present writer has had attention called from the Bench to infringements of this rule, which, it may be assumed, has come down to us from times when the power of the press had not established itself as it has in these days.—*S.J.*, 1931, p. 161.

Through American Eyes.—Rather more than a quarter of a century ago, Sir Frederick Pollock wrote that "the interest of our American brethren in English courts and procedure is as inexhaustible as it is flattering." Interest in those matters continues, and, what is still more flattering, it is accompanied by a sincere admiration. If it be true, as someone has said, that a foreign nation is a kind of contemporary posterity with, as a consequence, an entire absence of partiality in its judgments, it would seem that our administration of justice really merits the commendation which is accorded to it by our kin beyond sea. The most recent instance of this may be found in the current issue of the *American Bar Association Journal,* in which Professor Pendleton Howard, of the University of Idaho, writes enthusiastically of our Court of Criminal Appeal. In his introductory sentences he says that "there is probably no feature of the English administration of justice which illustrates in more convincing fashion the fundamental differences between the criminal procedure of that country and that of the United States than the conduct of criminal appeals. Speed of determination, brevity of opinion, paucity of judicial rhetoric, concentration on the outstanding issues of the fairness and legality of the defendant's trial and the reasonableness of the jury's verdict—these are the salient characteristics of the work of the English Court of Criminal Appeal." Surely no more flattering picture of this tribunal could be drawn, and we believe that it is true. Proceeding, the learned writer deals in some detail with a number of points in connection with the methods and practice of the Court, dwelling in particular upon that feature of its influence which we have always regarded as one of the most beneficient, namely, its reflex effect upon the lower

Courts. In the pre-Court of Appeal days instances were common enough of very rough justice, and of extremely heavy sentences, the inferior Courts in which such things happened having no fear of enquiry before their eyes. All that is changed. A complete transcript of the proceedings at the trial is available, and is, or may be, submitted to the scrutiny of the Court of Criminal Appeal, and that fact alone has a powerful and steadying influence in regulating trials and in guarding against sentences which err on the side of severity. And yet, as we are reminded, there were those, and many of them in high places in the law, who looked with much disfavour on the institution of this court. Even the late Sir Fitzjames Stephen thought it an almost insuperable difficulty in the way of setting it up that there was the possibility, nay, the probability, of dissenting judgments. That supposed obstacle was very easily overcome by the provision of allowing one judgment only, as has always been the case in the Privy Council—a rule which might well be adopted in every court, seeing the endless trouble that is caused by dissenting opinions. The law ought above all things to be certain, and certainly is not achieved by divergence of view in the pronouncements of the Court.—*S.J.*, 1931, p. 196.

Poor Persons Procedure.—Both branches of the legal profession may find considerable cause for self-congratulation in the fifth annual report of the work of the Poor Persons Procedure Committee of the Law Society for the period December, 1929, to December, 1930. The public is surprisingly ignorant of the fact that the whole of the work for poor persons done by barristers and solicitors is undertaken voluntarily and gratuitously, and the report with its bare statement of the figures of the achievements of the committee during the period under examination deserves a wide publication. There were, at the beginning of 1929, 937 cases awaiting trial and 1,517 actions or matters were entered during the year in London and in the Provinces. Of these, 1,339 actions or matters were dealt with, of which 1,238 succeeded, forty-three failed and fifty-eight were abandoned or struck out. Of the total number of cases disposed of 94 per cent. consisted of matrimonial proceedings, and in 97 per cent. of the total number of cases poor persons were successful. During the year the total sum recovered by poor person litigants either by judgment or by settlement of their actions was £14,500 as compared with £10,300 in the previous year. In London at the beginning of 1930 there were

116 applications pending, and 1,974 new applications were received during the year, of which 889 were granted, 714 refused, and 341 were otherwise disposed of, leaving at the end of the year 146 remaining to be dealt with. Approximately 70 per cent. of the London cases were matrimonial. In London and the provinces the number of applications disposed of showed an increase from 4,411 in 1928 to 4,904 in 1929. These figures speak eloquently of the substantial and progressive results achieved by lawyers in this entirely gratuitous branch of their activities, often at the cost of great personal inconvenience and sacrifice. It is facts like these which give the lie to the threadbare prejudice against the "scheming and avaricious" lawyer. —*S.J.*, 1931, p. 196.

A Strange Oath.—Recently, in Lord Darling's Court, a Roman Catholic juror declined to be sworn on the Authorised Version of the Scriptures. As a Douai version was not forthcoming, he consented to affirm instead.

Every now and then the formality of the oath gives rise to perplexity in Court and sometimes to humour. One of the oddest errors occurred last year at Willesden Police Court when a communist who would not take the oath desired to affirm. A card was handed to him from which he duly read a form of words. Then the Court suddenly realised that he had been given the wrong card and had trustfully taken the oath of allegiance as a special constable.—*S.J.*, 1931, p. 204.

CONTEMPORARY LEGAL LITERATURE.

Not infrequently does it happen that an advertiser caricatures a living person to serve his purpose and though in such cases the advertiser does not intend to libel, the advertisee feels his privacy intruded upon and desires to stop such intrusion. The law on the point is not definite and settled as yet and a note in the *United States Law Review* for February, 1931 and another in the *Law Quarterly Review* by Professor P. H. Winfield, LL.D., discuss the subject in full detail. In America, the theory that the common law recognised a right of privacy was advanced by Messrs. Warren and Brandeis in 4 *Harward Law Review* 193, basing it on *Pollard* v. *Photographic Co.*, (1888) 40 Ch.D. 345 and *Pope* v. *Curl*, 2 Atk. 342, but it was negatived in 1902 by New York Court in *Robertson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, by a majority of four Judges against three. Chief Justice Parker whose opinion prevail-

ed foresaw in its recognition 'a vast amount of litigation...... ....bordering upon the absurd.' Judge Gray put the other view emphatically: "The proposition is to me an inconceivable one that these defendants may, unauthorisedly, use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety without right to invoke the exercise of the preventive power of a Court of Equity." The *United States Review* points out that in Georgia, Kansas, Kentucky, Louisana and Missouri, the right of privacy has been sustained, and in Michigan, New York, Rhode Island, and Washington it has been denied. In the other States the question has not yet arisen for decision. In New York, the right has to a certain extent been recognised by the Legislature in 1903.

Prof. Winfield discusses the subject more elaborately with the right of privacy both with respect to property and person. He defines infringement of privacy as an "unauthorised interference with a person's seclusion of himself or of his property from the public". To the extent to which the invasion can be brought in under the other known headings of tort, there is no difficulty. But where it does not amount to defamation, trespass, nuisance or the like, the English Common Law recognises no right of privacy. As the Professor says, *Tolley* v. *J. S. Fry and Sons, Ltd.*, (1930) 1 K.B. 467, shows that the right must be recognised by the House of Lords or the Legislature. In that case a firm of chocolate manufacturers published, as an advertisement of their goods, a caricature of the plaintiff, depicting him as playing golf with a packet of their chocolate protruding from out of his pocket. A caddy was also represented with him and a doggerel verse was written underneath it likening the excellence of their chocolates to his drive. The Court of Appeal held that the firm were not liable as for defamation, as it was not capable of a defamatory meaning and by a majority dismissed the action.

As regards personal property, the right is recognised to a considerable degree by the Law of Copyright, Patents, Designs, Trade-marks and Trade-names, the covenants in restraint of trade and the principle which enables the Courts to restrain anyone in a confidential position from disclosing information with which he has become acquainted in that relation.

As regards real property, where there is actual entry on the land, the law of trespass is sufficiently adequate for the

purpose. But where the infringor is not on the land but loitering on the highway in order to spy upon an adjacent landowner or to disturb him in the enjoyment of his property, an action in trespass can be maintained only where the user of the highway is unreasonable. (*Harrison* v. *Duke of Rutland,* (1893) 1 Q.B. 142 and *Hickman* v. *Maisy,* (1900) 1 Q.B. 752.) These cover cases where the plaintiff is the owner of the soil of the highway, but as the law stands it may not help any one who has a less title than ownership or who has none at all. The writer suggests that borough and county councils may make rules to meet cases like the one where a person without causing obstruction to the highway stares at a man's window. Law of nuisance meets the contingency to a certain extent. The Professor refers to a case recorded by the late Professor Kenny (Cases on Tort, 4th Edn., 1926, p. 367), in which a family in Balkham so placed mirrors in their garden as to be able to observe all that passed in a neighbouring dentist's room. The dentist failed in an action to prevent the "annoyance and indignity" caused to him. The writer points out that it should have been actionable as a nuisance as held in *Lyons & Sons* v. *Williams,* (1899) 1 Ch. 255.

The law does not now interfere to prevent a landowner from opening new windows which command a view of his neighbour's premises. The little doubt there was before was set at rest by *Tapling* v. *Jones,* (1865) 11 H.L.C. 290. The building of a high wall which interferes with the neighbour's enjoyment of his garden does not afford a cause of action either. Privacy of property can be secured to a certain extent by contract. In India, as the Professor points out, the question is dealt with by S. 18 of the Easements Act and it is possible to acquire an easement of privacy by virtue of a local custom. The Professor summarises his discussion as to privacy of property thus: "It appears to be tolerably well protected, allowing for the necessity of meeting the requirements of society at large as well as those of the person whose privacy is in question. He can, to a certain extent, secure seclusion of his property by contract. Infringement of it, where there is no contract of this sort, is not regarded as an independent tort, but is redressible by actions for nuisance or for trespass or for negligence or for some other appropriate tort, or (where the property is personal property) breach of copyright, breach of patent, and the like. And in some instances the criminal law provides remedies."

X

The other question, namely, whether there is any legal redress for invading the personal privacy of an individual, is more private to answer. Greer, L.J., who denied this right of privacy unless the publication can be said to be defamatory, said in *Tolly* v. *Fry,* that the defendants in publishing the advertisement in question, without obtaining Tolley's consent, "were acting in a manner inconsistent with the decencies of life, and in so doing they were guilty of an act for which there ought to be a legal remedy," but denies the legal remedy relying on *Dockrell* v. *Dougall,* 80 L.T. 556 and *Corelli* v. *Wall,* 22 T.L.R. 532. The Professor discusses the two cases and points out that they did not decide the question at issue so as to fetter the Court of Appeal for deciding it itself. "The balance of existing dicta," says the Professor in conclusion, "seems to incline against an affirmative decision not only in the Courts of first instance, but probably also in the Court of Appeal. The House of Lords, however, certainly have a free hand and it is submitted that social exigencies at the present day would justify them in recognising such a tort." The Professor gives several illustrations where the law as it is is helpless and sums up his conclusion as follows:—"Offensive invasion of personal privacy ought to be an independant tort classified under 'torts to the person' and actionable without proof of social damage. Its truth, where it takes the shape of a representation, ought to be immaterial. As a matter of law, the Judge ought to be entitled to settle whether there is or is not sufficient evidence of offensiveness for a jury to decide, as a matter of fact, whether the invasion was, in the circumstances, offensive. The right of privacy should be capable of express or implied waiver. Fair comment and privilege, as known in the law of defamation, should be applied only sparingly and at most by way of analogy."

The Law Quarterly Review for January, 1931, reproduces the address delivered by Chief Judge Benjamin N. Cardozo at the convocation of Columbia University on September 4, 1930, welcoming the distinguished guests from England, France and Germany to confer on them the honorary degree of LL.D. The address is short and sweet and deserves much consideration, especially at this time, when the Madras Bar Council is considering to take up legal education into its hands. The guests from England were Viscount Dunedin, Lord Tomlin, Lord Macmillan, The Attorney-General Sir William Jowitt, Sir John Simon, Sir Frederick Pollock and Sir Roger Gregory. He says: "A Uni-

versity is a place where one is to teach learning imaginatively." You can pick up facts almost anywhere—in school, in books, in the street, in business, very likely in prison, at any place where life is lived, but if you seek to clothe your teaching with the vestments of grace or poetry or philosophy, with the aspect of fraternity, its proper home is a University". Later on he says that it is quite true of law as it is of anything else, that at first law was taught even at the colleges unimaginatively. It was a thing to be learned by rote from text-books whose pronouncements were to be accepted as an act of faith. Then it was taught scientifically, but still unimaginatively. That was the era of case books, an era of undivided hegemony now drawing to a close. We are looking beyond that now, to something higher and finer. We are trying to teach law and to study it scientifically, and yet imaginatively too,—feeling our way to a new sense of its significance, of the forces that have brought it into being, of the processes that are keeping it alive, and of the ends that it must serve and foster if its high potencies are not to fail. It cannot be denied that law is rapidly growing with changing social conditions and as new situations arise, the old case-law can hardly guide the lawyer and unless he has studied law imaginatively, it may be difficult to apply the principles of law to new situations as and when they arise.

The note in the *United States Law Review* for November, 1930, headed "Claim of immunity from self-incrimination by public officers" calls for more than a passing notice. It appears that certain public officials in the city of New York, also Tammany district leaders, refused to waive the constitutional immunity against self-incrimination when they were called before a grand jury, empanelled by order of the Governor to investigate charges of corrupt money payments to secure appointment or nomination to public office Naturally this seems to have evoked public resentment. Two schools developed to meet this problem, one proposing such amendments to the statute as would terminate the tenure of party office or public office of any official who invokes the constitutional privilege and refuses to answer, and the other declaring in favour of legislation or constitutional amendment to the effect (*i*) that the acceptance of public office shall constitute a waiver by a public officer of the privilege against self-incrimination in respect to any official act or conduct, and (*ii*) that the pleading by any public officer of such privilege against self-incrimination in respect to any official act

or conduct shall create a vacancy in his office. The note discusses the American cases dealing with the legality of such legislation and seems to incline against the constitutionality of legislation, as it interferes with the exercise of a privilege firmly fixed in the *constitution*. It can only be done by an amendment to the constitution.

If citations of American precedents is not noticeably encouraged in English Courts, it is because of the unfamiliarity with the details of the American Law and the conditions obtaining there and the consequent fear that such citations may lead one astray. But in the case of Justice Holmes to whom great men like Lord Sankey, Sir William Jowitt, Sir Frederick Pollock and Chief Judge Cardozo have sent in their felicitations on the occasion of his ninetieth birth day, and in active and brilliant service in the most important sphere of judicial activity, it may not be too much to say in the words of Sir William Jowitt that the Bench and the Bar have repudiated this unfortunate practice referred to by Chief Judge Cardozo in his address of welcome at the Columbia University Convocation on September 4, 1930, as frowning upon American citations. His name is a by-word here and his 'common law' is referred to everyday with avidity. Chief Judge Cardozo calls him 'the great overlord of the law and its philosophy' and the *Harward Law Review* (March, 1931) has allotted more than one hundred pages for him.

BOOK REVIEWS.

MALABAR TENANCY LAW, by Mr. K. P. Ramakrishna Aiyar. Price Rs. 4.

Malabar Tenants' Compensation Act (I of 1900) was a sufficiently difficult Act to construe and it can hardly be said that the construction of the various sections of the Act is even now finally settled. And now we have the new Act XIV of 1930. In the attempt at reconciling the various landed interests, the Legislature has had to enact many complicated provisions about fair rent, *kudiyiruppu*, conditions of eviction, and so forth which must necessarily raise difficult points for construction by the Courts. Mr. Ramakrishna Aiyar has given a helpful commentary on both these Acts. On the Compensation Act, there is a considerable body of case-law which he has carefully digested. On the Tenancy Act he had to proceed without such assistance but the useful reference to the proceedings of the Legisla-

tive Council and the various reports may assist the practitioner in the understanding of the Act though they might not be of use for construing the Act. The book is moderately priced.

THE MALABAR TENANCY ACT, by Mr. C. Govindan Nayar. Price Rs. 12-8-0.

This is a more ambitious attempt, though it confines itself to the Act of 1930 The aim of the work is to indicate the sources of the various provisions of the Act and to elucidate their meaning and the principles underlying them. The author has given a comprehensive historical introduction dealing with the various attempts at the investigation, elucidation and improvements of tenancy conditions in Malabar. He has given copious references to the proceedings of the Legislative Council and the various reports. He has given references to interpretations that have been put upon similar terms in other enactments or judicial decisions which are germane to the present. The rules framed under section 54, the Sudder Court Proceedings dealing with the land tenures, and the Malabar Compensation Act have been given in appendices. In fact, he has gathered together with admirable industry and ability all that is to be known about so recent and important a measure. We have no doubt it will be of great use to practitioners.

THE CRIMINAL RULES OF PRACTICE (MADRAS). Published by V. S. N. Chari. Price Rs. 2.

The publishers have done a useful service in bringing out this volume containing all the Rules of Criminal Practice in the Presidency up-to-date. The Criminal Rules of Practice of 1910 have undergone changes in order to cope with the alterations and additions to the Criminal Procedure Code itself. The appendices contain all the various forms and several orders under the special enactments applicable to Criminal Courts. We are sure this publication will be supplying the demand for the new rules which are of everyday use.

THE PRIVY COUNCIL AND THE FULL BENCH DECISIONS. Edited by A. S. Srinivasa Iyer. Annual Subscription, Rs. 6.

We have pleasure in congratulating the journal for having entered on the second year of its existence. The editor himself hopes that "to publish judgments which have a permanent and perennial interest to lawyers in an easily accessible and readable form is not a disservice". Indeed, it is our hope as well.

THE LAW OF INCOME-TAX IN BRITISH INDIA, MYSORE AND TRAVANCORE, by Mr. N. Rajagopalachariar, B.A., B.L., Advocate, High Court, Madras. Printed at the Madras Law Journal Press, Mylapore. Price Rs. 8.

To the average lawyer not familiar with the intricacies of the Income-tax law, this branch of law presents only an unintelligible set of rules and a confusing mass of case-law. The leading commentaries on the English and Indian Acts while they are undoubtedly learned and exhaustive, have not tended to remove that impression. Mr. N. Rajagopalachariar who as the reporter of the Indian Law Reports for a long number of years had to watch the arguments of eminent Counsel in tax cases apparently realised the difficulties of the profession in understanding the subject and has brought out this work which is conceived in a plan essentially different from the treatment of it by the commentators on the Acts. In the volume under review, the law of Income-tax in British India has been dealt with in the form of a treatise in the natural order of the topics in the course of about 140 pages and nine chapters. The second part of the book gives the Indian Income-tax Act with the notes to the sections, the Income-tax rules and other allied information. In following this method, the learned author has followed the well-known models of Mitra on Limitation and Sir Rash Behari Ghose's Law of Mortgages. The first part, which is easily the more interesting and instructive part of the book, deals with the subject under the following main heads:—Income-tax, Income, Capital, Basis of Taxation, Non-taxable and Taxable Persons, Non-taxable Income, Taxable Income, Accounts, Machinery—Procedure and Remedies, Questions of Law and Fact, and Interpretation of Statutes. All the Indian decisions on the subject including those given by the Mysore and Travancore Courts and most of the English decisions have been given without unnecessarily tiring the reader by a statement of their immaterial facts. The peculiar features of this work are the clearness of the statements of law and the aptness of the decisions cited to the points illustrated by the author. The subject is not merely one of practical interest to the lawyer but to every one who makes an income and it is the triumph of the author that he has evolved a logical scheme out of apparent chaos and has made the subject intelligible and even interesting to the lay reader. We have every hope that the book will before long find its place among the leading text-books on the subject.

THE ENCYCLOPÆDIA OF INDIAN CASE-LAW, CIVIL (1811 to 1929). Edited by Mr. T. P. Gopalakrishna Aiyar, B.A., B.L., Advocate, assisted by a number of Members of the Bar. Each part Re. 1.

This is a work in the course of publication by an enthusiastic body of lawyers of which we have received the first few parts. The plan of the work has, so far as we are aware, no parallel in India; the Encyclopædia of the Laws of England and Halsbury's Laws of England are probably the works on which the authors have modelled their publication. We agree with the authors that the work if properly carried out will involve an almost superhuman effort to produce and bring to completion; and we sincerely congratulate the authors on the noble ideals that they have set before themselves. Further the work of the authors will not be finished as soon as all the volumes have appeared as they will have to be kept up to date by annual supplements as we find in the case of Halsbury's Laws of England. We have read carefully some portions of the parts of the work published hitherto and we venture to think that the statements of the law in some places are inaccurate in some material particulars. For instance at page 13 under the heading "Abatement of Appeals" we find it stated that where a person, as the reversioner to the estate of a Hindu widow sues to set aside alienations made by the widow, the suit cannot be continued after his death, as his right to sue is a personal right and ceases with the death of the plaintiff. The authority by which it is supported is *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*, (1904) 27 Mad. 588. This statement of the law seems to be clearly wrong after the decision of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal*, (1915) 38 Mad. 406, where it was pointed out that in such a suit the plaintiff is suing in his representative capacity and there can therefore be no question of abatement. Indeed, *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*, (1904) 27 Mad. 588, has been expressly overruled by the Full Bench of the Madras High Court in *Varamma* v. *Gopaladasayya*, (1917) 41 Mad. 659. To point to one other instance, we would refer to pages 242 and 243 of the work where it is stated that in a suit by a trustee of a temple for a declaration that a certain piece of temple land could not be the object of a permanent lease, it being temple trust-property in spite of long adverse possession under a grant by a previous trustee of a temple, the mulgeni lessee having been in possession as such for over twelve years would acquire

title by prescription on the authority of *Narsaya Udpa* v. *Venkataramana Bhatta,* (1912) 12 M.L.T. 218. This seems to be an inaccurate statement of the law after the decision of the Privy Council in *Vidya Varuthi* v. *Balusami Ayyar,* (1921) 44 M. 831. The exact point has been decided in the contrary way in *Rao Bahadur Govinda Row* v. *Chinnathurai Pillai,* (1925) 49 M.L.J. 640, following in the earlier case of *Mahomed* v. *Ganapati,* (1889) 13 M. 277, after a careful review of authorities. Such inaccuracies somewhat detract from the merit of the work and we fully hope that in bringing out the later parts, the authors will bestow a greater care in the statements of law. We wish the authors every success in the somewhat stupendous task that they have undertaken and hope that the work will be found to supply a real want.

HINDU LAW SERIES, NO. I—STRIDHANAM, IN TAMIL, by Mr. M. S. Parthasarathi Aiyangar, B.A., B.L., Pleader, Tiruvallur. Price As. 8.

The Law of Stridhanam in Hindu Law is a difficult branch of the subject having regard to the various kinds of stridhanam in the various provinces and with regard to their devolution and incidents. On a subject of such difficulty, even statements of learned authors are apt to be misleading or inaccurate; and the client cannot do better than taking himself to a lawyer who can consult the leading authorities on the subject and advise him. A statement of the law of the subject in Tamil with the references to the reports themselves which are in English, cannot, even if accurate, be very helpful. We, therefore, doubt the utility of this publication which cannot be of any real value to the litigant public.

INDIAN SALE OF GOODS ACT, by M. N. Kanji Lal, M.A., LL.B., (Cantab), Bar-at-Law, 1931. Price Rs. 6.

Since the enactment of the Indian Sale of Goods Act, several commentaries of the Act have appeared. The volume under review is conceived in a different plan from the rest. The subject is dealt with by the author in the natural order of the topics discussed in the form of a treatise in the course of eight chapters and not by way of annotations under each section of the Act, thus giving the reader, who is not already familiar with the subject, a connected view of the whole. The decisions up to date are noticed in their appropriate places. The Act

itself is given as an appendix and reference is given under each section to the body of the work where the particular provision has been considered and the cases under it are given. The report of the Select Committee, notes on the clauses of the Bill and the English Act are also given as appendices. We believe that this mode of treatment will be found useful and appreciated by the students and members of the profession.

HINDU LAW IN ITS SOURCES, by Ganganath Jha, 1930, Vol. I. Price Rs. 10.

The learned author has done a distinct service to the cause of comparative jurisprudence by bringing out this work which gives a faithful translation of the original texts of Hindu Law in its various branches. It is well known that the British Courts of Justice administer the rules of Hindu Law only in some of its branches, *e.g.*, marriage, adoption, inheritance, etc.; and in other respects we are governed by the British Indian Codes or the rules of English Common Law or Equity which are adopted in this country as rules of justice, equity and good conscience. A statement of the Hindu Law in the other branches, in the language of the original text-writers themselves with an accurate translation of the same is of great value to the jurist though not to the work-a-day lawyer. In the first two chapters, the author has discussed the sources of Hindu Law, a subject which is found in all treatises on Hindu Law, with this distinction that the author has brought to bear on the subject his great learning in *Purva Mimamsa* in illustrating his points. He has shown in many places the freshness of outlook in the discussion of the relative values of the various sources of law in the ancient books themselves. In many respects, the *Tantravartika* of Kumarila Bhatta from which long extracts are given will do credit to any modern thinker on the questions dealt with. The later chapters giving the texts and translations of the various branches of law, like judicial procedure, evidence, debts, deposits, master and servant, crimes, etc., are valuable as giving a clear insight into the law and practice of the ancient Hindus. While there are striking similarities, even in matters of procedure, there are also striking dissimilarities, as for instance what we find at page 92, when an appeal was preferred from the decision of a Court and the appeal succeeded, the decree-holder in the first Court and curiously *even the members of the first Court were fined* double the amount of the claim involved, if the wrong judgment was due to mistake on the part of the

Judge and assessors and if it was due to the witnesses they were fined. To give only one instance of similarity, we find at page 493, in cases of adultery only the man was punished and the woman was not punished by the State, thus bearing a striking resemblance to section 497 of the Indian Penal Code. The second volume which is in the press, we understand, deals with inheritance and will therefore be of practical interest to lawyers. We have no doubt that this work will be widely appreciated by all who are interested in comparative jurisprudence and Hindu jurisprudence in particular.

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NOTES OF INDIAN CASES.

MUNICIPAL CORPORATION OF RANGOON *v.* PAZUNDAUNG BAZAAR CO., LTD., I.L.R. 8 Rang. 143.

On the assumption that public bodies would exercise the powers given to them reasonably, the legislature has in many cases vested in them a large discretion in several matters. But cases have often arisen where that discretion has been misused —it may be for assumed public benefit—and the Courts have been called upon to interfere. In the case under discussion the Court declined to interfere with the discretion of the Corporation in fixing a particular fee for licenses on markets on the ground that "the Court has no right to interfere until it is established that the fee so fixed is so unreasonable as to be illegal," the burden of proving that it was excessive being thrown on the subject. Lord Herschell, L.C., points out in *Institute of Patent Agents* v. *Lockwood*[1] that where there is the power in a Corporation to impose fees at all, and the Corporation sanctioned a particular fee, it would not be "an improvement upon the scheme of legislation which gave power to fix fees if those fees were made subject to the control of the Judges according to their views of what fees were reasonable or unreasonable." See also *Duke* v. *Rameswar Malia.*[2] In *Corporation of Madras* v. *Spencer & Co.*[3] the Court interfered with the levy of a fee on the ground that "it was not done with a view to pay for the expenses in connection with such licenses, but also obviously done to increase the revenue of the Corporation from liquor" and "as a counter-demonstration to the order of Government

1. (1894) A.C. 347 at 355. 2. (1899) I.L.R. 26 C 811 at 815.
3. (1929) I.L.R. 52 M. 764: 57 M.L.J. 71.

refusing to allow the Corporation to take the abkari revenue of the City"; but the Court declined to decide what the reasonable fee would be, as it would amount to the Court taking upon itself the power conferred by the Act upon the Council. The *ratio decidendi* of these cases is that the Council is empowered only to collect a fee and not a tax and if the extent of the fee is such as to lead to the inference that it is "a tax in disguise" then the fee is *ultra vires* the Council. The errors in assessment are not then irregularities merely but such as go to the ground-work of the tax, and may be reviewed by the Civil Court. (See *per* Mookerjee, J., in *Chairman of Giridih Municipality* v. *Srish Chandra Mozumdar*[4].) The Court has interfered where the public bodies have exercised the powers vested in them for ulterior purposes or in a capricious or arbitrary manner (see *Taluk Board, Bandar* v. *Zamindar of Chellapalli*,[5] and *In re Manick Chand Mahata* v. *The Calcutta Corporation and the Calcutta Improvement Trust*[6]). Abdur Rahim, J., observes in *Taluk Board, Bandar* v. *Zamindar of Chellapalli*[5] that "where it is clear that a discretionary power has been exercised in a manner which could not have been in the contemplation of the legislature, then the Court has undoubtedly jurisdiction to interfere."

4. (1908) I.L.R. 35 C 859 at 866.
5. (1920) I.L.R. 44 M. 156 at 160: 40 M.L.J. 91.
6. (1921) I.L.R. 48 C. 916.

THE MADRAS LAW JOURNAL.

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NOTES OF RECENT CASES.

Jackson, J. Cr. A. No. 391 of 1930.
27th November, 1930.

Indian Penal Code, S. 387—Offence triable by assessors—Tried by Jury—Effect on the right of appeal.

If an offence triable by assessors is erroneously tried by Jury, the accused has a right of appeal on facts, treating the charge to the Jury as the judgment, and the verdict of the Jury as the opinion of the assessors.

26 Mad. 243 (*n.*): 6 M.L.J. 14 followed.

25 Bom. 680 distinguished.

V. L. Ethiraj and *M. Sriramamurti* for Appellant.

The Public Prosecutor for the Crown.

S.V.V.

Jackson, J. C.R.P. No. 691 of 1929.
28th November, 1930.

Civil Procedure Code (V of 1908), *Order 2, rule 2—Subscription to chit fund payable in instalments—Whole amount recoverable on default—Suit filed after default to recover part of amount due—Subsequent suit for balance—Bar.*

The plaintiff claimed as the assignee of a Karaswan's right in a chit fund, the subscriptions payable in a number of instalments by the defendant. By a document executed by the defendant in favour of the Karaswan, he made himself liable to pay all the future instalments at once in case he made default in the payment of any one instalment. The defendant having committed default the plaintiff sued him to recover a portion of the amount that had become payable and obtained a decree. Subsequently he brought another suit for the balance still due.

Held, that the later suit was barred by O. 2, R. 2, Civil Procedure Code.

(1929) M.W.N. 204 followed.

A. Swaminatha Aiyar for Petitioner.

K. Balasubramania Aiyar for Respondent.

B.V.V.

Madhavan Nair, J. S.A. No. 1583 of 1927.
1*st December*, 1930.

Fraud—Suit to set aside decree for fraud—Wilful suppression of fact which it was the duty of plaintiff to disclose—Defendant remaining ex parte—*Court, if can set aside the decree.*

Where a party obtains a decree in a suit in which the defendant is *ex parte* by deliberately putting forward a false case before the Court and by misleading it by suppressing a fact which it was his duty to disclose to the Court, such a decree cannot be set aside in a subsequent suit on the ground of fraud practised upon the Court by putting forward a case false to the knowledge of the plaintiff.

18 C.W.N. 447; 63 I.C. 712; 23 I.C. 976 followed.

Cases like 38 Mad. 203, 41 Mad. 743 where material evidence was suppressed or perjured evidence given distinguished.

Case-law discussed.

The unquestioned jurisdiction of a Court to set aside a decree on the ground of fraud is to be exercised with care and reserve.

41 Cal. 990 referred to.

P. Venkatramana Rao for Appellant.

P. Somasundaram for Respondents.

S.V.V.

RAJ NARAIN RAO *v.* RAM SARUP, I.L.R. 52 All. 481.

It is one thing to say that Art. 64 (Limitation Act) applies to a particular case but it is quite another question as to how far on this kind of action the account stated can be gone behind to show that a portion or whole of the claim forming the subject-matter of the account stated was barred at the time of the statement of accounts and as such could not be sued upon. It is not necessarily involved in this kind of action that there should be cross-demands and settlement of the same. *See* 7 Hals. 489. When there are cross-demands, then the statement of account amounts to a new contract and although the demand or demands on one side are barred, suit can be maintained on the statement of accounts. If, however, the demands are all on one side, and only payments on the other the statement of account can save the bar of limitation of the original claim only if it could be read as an express promise to pay. An account stated as such may not amount to such promise but the words used might be such as to amount to a promise. All that *Manjunatha Kamti* v. *Devamma* alias *Gomathiamma*[1] decided was that to bring a case within Art. 64 as an account stated, it is not necessary that there should be cross-demands; it does not decide that such an account stated will save barred items. That is quite a different question. In England *an account stated* has got no special period of limitation prescribed. It has to operate as a new promise with consideration in which case there would be a new debt and a new period of limitation which will be the case when there are cross-demands or it may operate as an acknowledgment which will be of use only when it is signed or it must be used as a payment in which case also writing is not necessary under the English Acts of Limitation. Where the account stated could be used as an acknowledgment or part payment in England there is no trouble even though at the time of the statement the original claim is barred as under the English Statutes acknowledgment or part payment need not be before the expiry of the period of limitation. In India having regard to the fact that account stated is specially provided for it would seem to follow that even though you have cross-demands, Art. 64 would govern and limitation would be saved only if there is writing. *Amuthu* v. *Muthayya*[2] and *Murugappa Chetty* v. *Vyapuri Chetty*[3].

1. (1902) I.L.R. 26 M. 186 at 187

2. (1892) I.L.R. 16 M 339.

3 (1916) 32 M.L.J. 536.

There are some cases in India which hold that where there is an oral settlement of accounts the article applicable would be Art. 115 on the ground that the 3rd column of the article must control the first. *Jahm Singh Srimal* v. *Choonee Lal Johurry*[4] and *Murugappa Chetty* v. *Vyapuri Chetty*[5]. This way of dealing with the article may not be quite legitimate. This is not tantamount to saying that an oral settlement does not give rise to a cause of action. *Marimuthu* v. *Swaminatha Pillai*[5] and *Mussammat Jawai* v. *Hussain Baksh.*[6] It may give rise to a cause of action and yet the benefit of Art. 115 may not be available. In the case under review the Court notes that the preponderance of view is in favour of the position that Art. 64 applies only to cases of cross-demands (*Jamun* v. *Nand Lal*[7] and *Suraj Prasad Pandey* v. *Raghunath Patnaik*[8]) but it was not necessary to decide that point in the case as in this case there was no settlement of accounts between the parties with mutual concurrence. When there is no such concurrence, their Lordships held there could be no account stated within the meaning of Art. 64. An account though purporting to be an account stated and signed by the defendant could be used in such circumstances only as acknowledgment or a payment which in this case could not save the claim as both these things took place only after the expiry of the period of limitation. The further question in this case was as to whether the fact that interest was being added to the principal in accordance with the original agreement in the creditor's books could make such addition a payment of interest within the meaning of S. 19 of the Limitation Act. Their Lordships hold that such initial agreement would not make it payment within the section unless there was consent each time the addition was made.

RAJA AJAI VERMA *v.* BALDEO PRASAD, I.L.R. 52 All. 536.

In Allahabad there seems to be the practice of sending for pleaders before dismissing an appeal for default. This practice is followed even in the High Court and their Lordships observe that this is a salutary practice and should not be discontinued for they say "in appeals especially it is not absolutely necessary that parties should be present in person when there are constituted agents in the shape of counsel in Court, counsel would

4 (1911) 15 C.W.N. 882. 5. (1897) I.L R. 21 M 366
6 (1921) I.L.R 3 Lah. 80 7 (1892) I.L.R. 15 A 1
8 (1920) 5 Pat. L.J. 371

be busy in several Courts and it is conducive to good work that they should be sent for". It would be desirable that in other parts of India also, this salutary practice is adopted in recognition of the elementary principle that the Courts are not for discipline but for administering justice.

JOKHU BHUNJA *v.* SITLA BAKHSH SINGH, I.L.R. 52 All. 539.

Two mortgages were created on a land, the earlier being a usufructuary mortgage, the later a simple one. The later contained a clause that the mortgagor would not be entitled to redeem the earlier mortgage without redeeming the later. The question was whether the mortgagee was entitled to insist upon the later mortgage being redeemed when the suit on that mortgage was barred by limitation. On this question there seems to be considerable difference of opinion. The case under review holds that that circumstance is immaterial. In *Sultan Muhammad* v. *Ladha Singh*[1] the Lahore Court also takes the same view, dissenting from *Kesar Kunwar* v. *Kashi Ram*,[2] which took the contrary view. The argument on one side is that the covenant is good, limitation only bars the remedy and not the right and that limitation applies only to suits and not to defences. The argument on the other side is that the covenant is to be construed only as a covenant to pay subsisting and enforceable mortgages and not a covenant to pay even barred mortgages, and even if there should be such a covenant it is unenforceable. Now, it is perfectly clear that according to all authorities the defence would be available in respect of payments connected with the mortgage transaction either as an amount that can be taken account of at the time of redemption, *Parasurama Pattar* v. *Venkatachalam Pattar*[3], or as a part of the mortgage money secured by the same document, *Nathamuni Pillai* v. *Vengammal*[4]. On principle it would follow that if the effect of the later transaction is to make the second mortgage amount a part of the same transaction as the previous the same result must follow. *A fortiori* it would seem to follow if the usufructuary mortgage itself provides that the mortgage could be redeemed only with the other mortgages and not apart, the effect of the clause being to make the land security for further advances. A provision in the second mortgage that the amount of the second

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1 A I.R. 1926 Lah 633 2. (1915) I L R. 37 A. 634

3 (1913) 25 M.L.J. 561 4. (1917) 5 L W. 593.

mortgage is payable along with the first and that the first could not be redeemed apart from the second would, it is conceived, amount to such a consolidation though the amount could have been sued for after the due date of the first mortgage and such a suit might be barred after 12 years. Again, is it not permissible to provide in a document two periods of payment one on one date and another on a contingency such as redemption of an earlier mortgage. It may not be open to a party to agree not to plead limitation but there is nothing against providing diverse starting points for limitation by inserting suitable covenants. It must also be noted that the exclusion of the later mortgage in *Kesar Kunwar* v. *Kashi Ram*[2] was not by reason of any specific rule of limitation but by the application of the spirit or the analogy of the Act or perhaps by applying the rule that Equity must follow the law. If a rule of law could be got round by some legerdemain in drafting without effecting the substance of the transaction, a suspicion legitimately arises as to the correctness of the rule and we think, judged from this test, the ruling under review and the Lahore ruling are more satisfactory than *Kesar Kunwar* v. *Kashi Ram*[2]. The Madras rulings in *Ramakrishna Kukkilaya* v. *Nekker Kuppanna*[5] and *Manjeshwar Naraina Rao* v. *Shiva Rao*[6] do not go as far as *Kesar Kunwar* v. *Kashi Ram*[2], no covenant like the one in the case under review being in question there.

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2. (1915) I.L.R. 37 A 634. 5. (1917) 33 M L.J. 581.
6 (1918) I.L.R. 41 M 1043: 35 M.L.J. 414.

MUKTAKESHI DASI *v.* MANILAL JANA, I.L.R. 57 Cal. 371.

In this case, the plaintiff had instituted a prior suit for rent against the defendant in which the latter contended that the land belonged to a third person and he held under that third person. That question was gone into in the rent suit and the Court held that the title was in the third person and the defendant held under him and the suit was dismissed. Subsequently, the present suit was brought by the same plaintiff alleging his title against the same defendant for ejectment but subsequently gave up his claim for possession and only asked for the settlement of a fair and equitable rent of the same land when the defendant set up the finding in the previous suit as to the title of the third person as a bar on the rule of *res judicata* and the High Court has held on the strength of a number of previous rulings that there is no bar.

While it must be recognised that the decision under notice is supported by the cases referred to, the question is not altogether free from difficulty, especially as the learned Judges themselves have held that if the defendant had set up his own title in the prior suit and succeeded in it, it would bar the later suit on title. The learned Judges would also hold that if in the prior suit the tenant had set up a third person's title and failed, the decision would be *res judicata* in a subsequent suit on title. It may at once be taken as settled that it cannot be said that a finding as to title in a rent suit will never be *res judicata* for the purpose of a subsequent suit based on title. See *Radhamadhub Holdar* v. *Monohur Mukerji*[1] and *Panchu Mandal* v. *Chandra Kant Saha*[2]. If this is accepted, where a previous suit for rent was dismissed one of the grounds for the dismissal being that the land belonged to a stranger and not the plaintiff and the defendant held under the stranger, it is difficult to see how the finding on the issue which really goes to support the decree in the rent suit which is not given in spite of the finding, can be said to be one which is only incidental and not one on a matter directly and substantially in issue. Where the findings on any one of the issues will support the decree, it has been held by the Calcutta and the Madras High Courts that in such cases the findings on all those issues will be *res judicata* in a subsequent suit. See

1. (1888) L.R. 15 I.A. 97: I.L.R. 15 C. 756 (P.C.).
2. (1909) 14 C.L.J. 220.

Peary Mohun Mukerjee v. *Ambica Churn Bandopadhya*[3]; *Rambehari* v. *Surendra*[4], *D. Narain Roy* v. *Jogeschandra*,[5] *Taritbarani Dasi* v. *Basumati Devi*,[6] *Venkayya* v. *Narasamma*,[7] *Venkataraju* v. *Ramanamma*[8] and *The Secretary of State for India* v. *Maharajah of Venkatagiri*[9]. We have referred to such a large number of cases only because the Allahabad High Court has held otherwise in *Shib Charan Lal* v. *Raghu Nath*[10] and *Jiwa Ram* v. *Kalyan*[11] to the effect that where findings on several issues support the decree, only those findings which should have been logically decided first are *res judicata* for a subsequent suit. If, therefore, the finding in favour of the third person's title was one of the findings on which the first suit for rent was dismissed, it would seem to be a material issue and its decision would be *res judicata* for a subsequent suit between the same parties. That a finding to operate as *res judicata* need not necessarily have been the basis of the previous decree was pointed out in *Taritbarani Dasi* v. *Basumati Devi*.[6]

HURRYBUX DEORA *v.* JOHURMULL BHATORIA, I.L.R. 57 Cal. 386.

In this case the question arose about the limits of the rule that a party who takes a benefit under an order cannot question it. The principle of the decisions has been based on the rule against a party being allowed to approbate and reprobate in respect of the same matter. *See* Halsbury's Laws of England, Vol. XIII, S. 508, page 364. The learned Judges have pointed out in this case that the rule has no application to a case where a person claims a larger amount but gets only a judgment for a small sum and costs and he draws this amount under the directions of the Court; in such a case the person so drawing out is not precluded from appealing against the order and claiming the larger amount therein. The rule and its limits have come up for decision in the Madras High Court in two recent cases, viz, *Ramaswami Chettiar* v. *Chidambaram Chettiar*[12] and *Venkatarayudu* v. *Chinna Ramakrishnayya*[13]. In the latter case, the learned Judges have made observations in similar terms as those in the decision under notice and have

3. (1897) I.L.R. 24 C 900.
4. (1913) 19 C.L.J. 34.
5. A.I.R. 1924 C 600
6. A.I.R. 1925 C 985.
7. (1887) I.L.R. 11 M 204
8. (1913) I.L.R. 38 M 158.
9. (1916) 31 M.L.J. 97
10. (1895) I.L.R. 17 All 174.
11. (1911) 8 A.L.J. 409
12. (1927) 26 L.W. 527.
13. (1929) 58 M.L.J. 137.

approved of the decision in *Jogendra Nath Banerjee* v. *Khoda Buksha Biswas*[14], which the learned Judges in the present case have followed.

TARUNCHANDRA GHOSH, *In re*, I.L.R. 57 Cal. 533.

The decision of the learned Judge in this case is one of far-reaching importance. The question before the Court was whether the High Court has power to appoint a guardian for a minor not being a European British subject who is not resident within the limits of the Ordinary Original Jurisdiction of the Court and the learned Judge has after some examination of the Charter of the Supreme Court and the Letters Patents, come to a halting conclusion that the High Court has the power and that such power has been saved by section 3 of the Guardians and Wards Act. Though some observations on the point in In re *Shannon*[15] and In the matter of *Sirish Chander Singh*[16] have been referred to by the learned Judge, it is somewhat strange that the attention of the learned Judge was not drawn to a direct decision on the question in *Annie Besant* v. *Narayaniah*,[17] where two benches of the Madras High Court came to the same conclusion after an exhaustive examination of the case-law, the Charter of the Supreme Court and Letters Patents. Though the Madras case was taken on appeal to the Privy Council and the decision of the High Court was reversed by the Privy Council, the conclusion of the High Court that the power of the High Court extends even to cases of minors outside its Ordinary Civil Jurisdiction is not affected by the decision of their Lordships which was rested on other grounds and the point under discussion was expressly left open. We may perhaps notice, though the matter has no direct bearing on the question under consideration, that a Full Bench of the Madras High Court has held that, notwithstanding the provisions in the Criminal Procedure Code, the High Court has the power to issue writs of *Habeas Corpus* outside the limits of its ordinary jurisdiction *See* In re *Govindan Nair*[18]. Reference may also be made to In re *Nataraja Aiyar*[19] where one learned Judge held that a writ of *Certiorari* can be issued by the High Court beyond such limits, a view which has since been accepted and followed.

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14 A.I.R. 1924 Cal 380
15 (1870) 2 N.W.P.H.C.R. 79. 16 (1893) I.L.R. 21 C. 206
17 (1913) 25 M.L.J. 661
18 (1922) I.L.R. 45 M. 922 43 M.L.J. 396 (F.B.).
19 (1912) I.L.R. 36 M. 72: 23 M.L.J. 393.

BALU HARSHET *v.* SHRIKRISHNA GOVIND, I.L.R. 54 Bom. 331.

One of the points laid down in this case is that no appeal lies under clause 15 of the Letters Patent against an order of a Judge of the High Court in second appeal refusing a declaration that the case is a fit one for appeal. The learned Judges have come to this conclusion on *a priori* considerations and without reference to the prior decisions on the same or a similar question. It may be useful to notice that a Bench of the Madras High Court has come to the same conclusion after a careful review of the decisions on the point. See *Ramanayya* v. *Kotayya*.[1]

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1. (1929) I.L.R. 52 M. 952: 57 M.L.J. 398.

KUMAR ABHAYANAND SINGH *v.* MAHARAJADHIRAJ SIR RAMESHWAR SINGH, I.L.R. 9 Pat. 314.

The only remark we have to make about this judgment is that as the language of the section is so clear, it is unnecessary for the Judges to have written an elaborate judgment. The Calcutta High Court has needlessly got itself into difficulties by ignoring the simple procedure provided by the Code. Wherever there is a compromise under O. 21, R. 3, the Court is bound to record it if it is satisfied as to its truth and lawfulness and then pass a decree in accordance with it. Wherever there is a dispute as to the fact or lawfulness of the alleged compromise the Court is bound to make an enquiry and record it or refuse to record it. An appeal under O. 43, Civil Procedure Code, is provided against such an order. There can be no appeal against the decree passed in accordance with the order recording the compromise. If in appeal the order is reversed the decree will automatically go. This is the view that the Madras High Court has taken in a number of cases and it is fully justified by the scheme and language of the Code. There is nothing in O. 23, R. 3 to prevent the Court from postponing for sufficient cause the passing of a decree in accordance with the compromise.

TENGAROO SUKUL *v.* CHATHU BHAR, I.L.R. 9 Pat. 347 (S.B.).

The Special Bench has overruled the decision in *Ramji Ram* v. *Banshi Raut*[1] where Justice Jwala Prasad made an attempt against the *cursus curiae*, to take out the "zirat" lands of the proprietor altogether, from the scope of the Bengal Tenancy Act (VIII of 1885). He held that notwithstanding the language of S. 116 of the Act, no occupancy rights can accrue in the zirat lands. His explanation of the concluding portion of S. 116 which expressly excluded only such of the zirat lands "as were held under a lease for a term of years or under a lease from year to year," was that it was inserted only by way of abundant caution to prevent confusion with the rights of a raiyat in respect of raiyati lands and that the Legislature needed only to make that point clear beyond doubt. This is of course a somewhat halting explanation and is not particularly convincing when it is remembered that similar language has been used from 1859 onwards and in a series of decisions it had been laid down by different Judges that the section operated to restrict the class of cases of zirat lands wherein the

1. (1924) I.L.R. 4 Pat. 89.

accrual of occupancy rights was prohibited. Some support was sought to be given for the view of Jwala Prasad, J., from the decision of the Privy Council in *Mahant Jagarnath Das* v. *Janki Singh*[2] but that decision merely related to the question of limitation with reference to tenants who held over after the expiry of the term under the registered lease of zirat lands. The present question could hardly be said to have been raised in that case. No doubt the somewhat wide observation of the Privy Council in *Raja Dhakeshwar Singh* v. *Gulab Kuer*[3] that "in these lands (private lands of the Zamindar) the raiyat cannot acquire a right of occupancy" may be invoked in support of the above view of the learned Judge. But the point was hardly discussed by their Lordships and the context shows that it was only a passing observation intended to contrast the ordinary raiyati lands and the private lands and the different classes of rights in them. Messrs. Mitter and Mukerji in their Commentaries on the Bengal Tenancy Act refer to the decision in *Ramji Ram* v. *Banshi Raut*[1] without dissent or disapproval but on the whole it must be conceded that the attempt of Justice Jwala Prasad could not be successful in the present state of authorities in the Indian High Courts.

SHAM DAS *v.* UMER DIN, I.L.R. 11 Lah. 312 (F.B.).

This Full Bench of the Lahore Court dissents from the Full Bench decision of the Madras Court in In re *Natha Venkatesa Perumal*[4] and prefers to follow the earlier decision in *Subba Naick* v. *Rama Aiyar*[5] which was overruled later. There is a good deal of force in the reasoning of Justice Tek Chand who points out that the language of S. 7 of the Guardians and Wards Act (VIII of 1890) is very general and there is no restriction that a conditional order cannot be passed in the first instance. We prefer the view of the Lahore Court. Section 34 of the Act is not exhaustive of the powers of the Court to ask for security in the matter of guardianship The later Full Bench decision of the Madras Court has taken a narrow view of the powers for which there is no sufficient justification in the Act itself. The practice was all along in accordance with the other view, and the Mofussil Rules of Practice also were drafted accordingly. The actual decision in the case could

2 (1922) L.R. 49 I A. 81 I.L R. 1 Pat 340. 43 M.L.J. 55 (P C.)
3 (1926) L R. 53 I.A 176 I.L.R 5 Pat 735 (P.C)
4 (1925) I.L.R. 49 M 809. 51 M.L.J. 726 (F.B.)
5 (1916) I.L.R. 40 M 775

have been rested on the grounds explained in the present judgment. The Calcutta High Court also is of the same opinion. *Harendra Nath Mukerjee* v. *Ardhendu Kumar Ganguly.*[6]

NAGESHWAR BUX ROY *v.* BENGAL COAL COMPANY, 60 M.L.J. 183 (P.C.).

The decision of the Board in *Nagheswar Bux Roy* v. *Bengal Coal Company*[7] is couched in language which is somewhat ambiguous and obscure. Properly understood, the decision however does not really conflict with the law as laid down in earlier cases. There was no question of *onus* of proof as such that is decided in the case. On the whole evidence their Lordships find that the defendant company had, in the particular case, established dispossession of the plaintiff for the statutory period by establishing that they themselves have been for such period in possession and enjoyment to the exclusion of or adverse to the plaintiff.

The plaint itself was laid merely as a suit for declaration and injunction. The article of the Limitation Act that would apply is Art. 120. The question of Art. 142 or 144 turned up only as tending to establish the plea of the defendant company that they had acquired a title to the minerals under the statute of limitations. Their Lordships, however, point out that with reference to this aspect of the matter, the Lower Court treated the case as raising an issue of adverse possession under Art. 144 rather than of dispossession under Art. 142. They hold that the right view however is that the case fell to be decided under Art. 142. This must be so, because the plaintiff could not place himself in a better position than what he would be in, if he had filed the suit as for recovery of possession. In such a case, the *onus* is on him to establish that they were dispossessed or that he had discontinued within twelve years prior to suit, under Art. 142 as was well established by the prior decisions of the Judicial Committee. That is why their Lordships say that the residuary article could not apply. So understood the decision is not only in conformity with previous decisions but is really based on them. The decision in *Secretary of State for India* v. *Chellikani Rama Rao*[8] is distinguishable as there the *plaintiff* claimed compensation for his

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6 (1914) 24 I.C. 202
7. (1930) 60 M L.J. 183 (P C)
8 (1916) L.R. 43 I.A 192, I.L.R. 39 M. 617 31 M.L.J. 324 (P.C.).

rights which he claimed as having been established in him by the provisions of the Limitation Act. It may also be noted that their Lordships hold that adverse possession by the defendant may and in the present instance did imply dispossession of the plaintiff. Of course dispossession of the plaintiff may be established by other ways as well. The possession of a third party may also operate as dispossession of the plaintiff. At the same time, even if the defendant also is in possession of some sort, it may not amount to dispossession of the plaintiff. For an instance of this sort, see *Kuthali Moothavar* v. *Kunharankutty*[9]. Even in the present case, the plaintiff had an initial point in his favour as the dispute related only to the right to the minerals underground. The presumption of possession therefore should be with the person who owns them. That is why their Lordships state the question as whether the defendant company have established dispossession of the plaintiff for the twelve years preceding the suit. But the evidence of actual adverse possession by the defendant and consequent dispossession of the plaintiff was so complete that the question of *onus* really became immaterial.

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9. (1921) L.R. 48 I.A. 395: I.L.R. 44 M. 883: 41 M.L.J. 650 (P.C.).

MADAN MOHAN SINGH *v.* RAM SUNDAR SINGH, I.L.R. 52 All. 553.

The question in this case was as to when limitation starts under Art. 23 of the Limitation Act when the accused is discharged but subsequently there is an application for revision to the Sessions Judge which is dismissed—whether from the date of the order of discharge or from the order of the Sessions Judge dismissing the revision petition. Their Lordships hold that the limitation starts from the latter date and not from the former. They point out that in this matter acquittal stands on a different footing from cases of discharge, because while the acquittal is definite and fixed in connotation "termination of prosecution is an elastic term which can include not only original proceedings but also subsequent ineffectual proceedings." *Balbhaddar Singh* v. *Badri Sah*[1] cited in this case but for another purpose would itself seem to be an authority for this position. While holding that the plaintiff has not got to prove that he is innocent but only that the proceedings have terminated in his favour, their Lordships state further "in the present case it was sufficient for the appellants to prove as they have done that the criminal proceedings threatened on account of the disclosure contained in the confessions of Raghunath Teja Sundar ended so far as they were concerned when the Sessions Judge finally refused to commit them for trial." This was a case of discharge by the Magistrate and the Sessions Judge issuing notice *suo motu* but finally declining to commit. Termination of the proceedings and termination of prosecution must mean the same thing. The difficulty of the Bombay High Court in *Purushottam Vithaldas* v. *Ravi Hari*[2] was, that the cause of action having arisen on the discharge, how it could be held to be suspended. There are two answers to the difficulty: just as the cause of action which has arisen might disappear by the final interference of the revisional authority, it might also disappear by the issue of notice by the Magistrate by destroying one of the essential conditions of the action, *viz.*, termination of the proceedings in favour of the plaintiff. Secondly, the starting of the cause of action need not necessarily be the starting point of limitation.

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1. (1926) I.L.R. 1 Luck. 215: 51 M.L.J. 42 (P.C.).
2. (1922) I.L.R. 47 B 28.

JADAB CHANDRA PODDAR *v.* RAMESHWAR MARWARI, I.L.R. 9 Pat. 332.

There is now a settled divergence of views amongst the High Courts as to whether the questions relating to "delivery and obstruction" under O. 21, R. 95, etc., Civil Procedure Code, relate to "execution, discharge or satisfaction" within the meaning of S. 47 and whether the questions arise between the parties where the auction-purchaser is the decree-holder himself. The Madras High Court has generally answered both the questions in the affirmative. The Calcutta High Court has in its latest Full Bench decision overruled some of the earlier cases to the contrary and has now taken the same view as the Madras High Court. *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar*[1]. The Patna Court has however refused to change its old view (*Haji Abdul Gani* v. *Raja Ram*[2]) which it adopted from the Calcutta Court when it took the contrary view and is not prepared to have the question referred to a Full Bench. The Bombay High Court also in *Hargovind Fulchand* v. *Bhudar Raoji*[3] had answered the question in the negative, overruling its previous decision in *Sadashiv bin Mahadu* v. *Narayan Vithal*[4] which conformed to the Madras view. The Allahabad Court had already taken a similar view by a majority judgment in *Bhagwati* v. *Banwari Lal*[5]. In view of this conflict of opinion it is desirable that the matter should be cleared up by the Legislature. As regards the second question the language of the Privy Council judgment in *Ganapathi Mudaliar* v. *Krishnamachariar*[6] is in favour of the Madras and Calcutta view though it was not a considered pronouncement on the question. We think the reasoning of Chatterjee, J., in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar*[1] is convincing as regards the first point. This conflict should be set at rest either by a decision of the Privy Council or by legislative interference.

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1 (1926) I.L.R. 53 C. 781 (F.B.).
2 (1916) 1 Pat. L.J. 232.
3. (1924) I.L.R. 48 B 550 (F.B.).
4. (1911) I.L.R. 35 B 452
5. (1908) I.L.R. 31 A. 82 (F.B.).
6 (1917) L.R. 45 I.A. 54: I.L.R. 41 M. 403: 34 M.L.J. 463 (P.C.).

RAMANATHAN CHETTY *v.* ALAGAPPA CHETTY, I.L.R. 53 Mad. 378; 59 M.L.J. 102.

The point in this case was whether applications to pass final decrees in suits for account of dissolved partnership are governed by Art. 181 of the Limitation Act. Mr. Justice Curgenven has come to the conclusion and we think rightly that there is no rule of limitation governing such applications as the Courts are bound to terminate such suits without application by the party. This was held in the Full Bench case in *Puran Chand* v. *Roy Radha Kishen*[1] in connection with an application to pass a final decree in respect of mesne profits and the same rule was applied in the case of a partition suit in *Dwarka Nath Misser* v. *Barinda Nath Misser*[2]. His Lordship points out the distinction between mortgage suits and partition suits in that in the former case the Statute requires an application by the party concerned whereas in partition suits no such application is required by the Civil Procedure Code. The law has been laid down in the same sense in partition suits by the Madras High Court also in *Appadu* v. *Venkataranga Rau*[3], *Appadu Patnaidu* v. *Appalaswami Patnaidu*[4] and *Srinivasa Mudali* v. *Ramaswami Mudali*[5]. In the last case the distinction between mortgage suits and other suits is also pointed out.

MUNICIPAL COUNCIL OF TIRUVARUR *v.* KANNUSWAMI PILLAI, I.L.R. 53 Mad. 352: 58 M.L.J. 377.

A contract of letting of tolls by a municipality did not comply with the statutory requirements as to writing and signature by two Municipal Councillors. The defendant went on with the collection of tolls till the end of the year and the question was what are the rights of parties in those circumstances. Their Lordships lay down the following propositions:—

(1) That the contract is void and unenforceable whether by the Municipal Council or by the defendant.

(2) The fact that the contract is fully carried out is immaterial.

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1 (1891) I.L.R. 19 C. 132 (F.B.)
2. (1895) I.L.R. 22 C. 425.
3 (1907) 18 M.L.J. 23
4 (1910) 8 M.L.T. 295.
5. (1915) 18 M.L.T. 145.

(3). But a decree may properly be given in favour of the Municipal Council on a principle analogous to *quantum meruit.*

In England, a distinction is made between cases where the requirement of writing is imposed by Statute and cases where it is a common law requirement. In the latter case, an action is sustainable when the consideration is fully executed. *Gas Light and Coke Co.* v. *Cannon Brewery Co.*[1] It is otherwise in the former case *Young & Co.* v. *Mayor, etc., of Royal Leamington Spa*[2]. Some of the cases in India (compare *Srirangam Municipal Council* v. *Bodi*[3] and *Municipal Committee, Gujranwalla* v. *Fazal Din*[4]) overlook this distinction.

The distinction is noted however in *Gas Light and Coke Co.* v. *Cannon Brewery Co.*[1] and further pointed out in *Douglass* v. *Rhyl Urban Council.*[5] In *Young & Co.* v. *Mayor, etc., of Royal Leamington Spa*[2] Lindley, L.J., points out that a decree on the basis of a liability *quasi ex contractu* for work done cannot be given against the Corporation as that would be defeating the object of the Legislature but the question before the House of Lords was merely whether the contract was enforceable on the footing of an executed contract. *Radha Krishna Das* v. *The Municipal Board of Benares*[6] negatived the claim against the municipality on the basis of section 65 of the Indian Contract Act holding that section inapplicable because that section applies only to cases "in which an agreement is void by reason of mistake or impossibility or in consequence of a want of legal consideration and also not to a case where the contract is *ab initio* void and not discovered to be void, and held also section 70 not applicable, because the plaintiffs could not be said to have lawfully delivered the goods and section 72, because there could be no question of mistake in a case like this. A different view has, however, since been taken. In *Mathura Mohan Saha* v. *Ram Kumar Saha*[7], Mr. Justice Mukherjee directed the Municipal Council to return the money received. The principle of the decision is that if the agreement is *ultra vires* or illegal the Corporation has no authority to hold the money and is bound to return it. "The obligation," says his Lordship, "to do justice rests upon all persons, natural and artificial; if one obtains

1 (1903) 1 K.B. 593 at 601.
2 (1883) 8 A.C. 517.
3. (1923) 45 M.L.J. 164
4 A.I.R. 1929 Lah 742
5. (1913) 2 Ch. 407.
6 (1905) I.L.R. 27 A. 592.
7. (1915) I.L.R. 43 C. 790.

money or property of others without authority, the law independently of express contract will compel restitution or compensation". It is doubtful how far this principle will assist when the claim is against the municipality for work done for in such case there is no property to return. The principle of *quantum meruit* is applied in *Mohamed Ebrahim Molla* v. *Commissioners for the Port of Chittagong*[8] and a private party entering into such an agreement with the Corporation was directed to pay for services done. In *Municipal Committee, Gujranwalla* v. *Fasal Din*[4] the Lahore High Court directed the private party to return the benefit he had derived under the contract, relying upon *Lawford* v. *Billericay Rural District Council*[9]. The judgment is unsatisfactory inasmuch as it does not notice the distinction between statutory requirement of writing and common law requirement as to the same. A later Lahore case *Prem Das* v. *Charan Das*[10] discusses the matter on principle. The statute in question there was the Government of India Act, section 30 (2). The Government had the benefit of the grain supplied by the private contractor and their Lordships held that section 70, Contract Act, would apply to such a case; whether under the English Law, the Court could make the order or not, under the Indian Law as laid down in S. 70 the Court could. Their Lordships refer to the observations of Justice Mukherjee in *Mathura Mohan Saha* v. *Ram Kumar Saha*[7] above referred to and justify the direction as to the return of the grain or its value on that footing also. In *Thangammal Ayiyar* v. *Krishnan*[11] (it was not a case of Corporation but of an agreement void under section 28 of the Legal Practitioners Act) their Lordships directed the client to pay a fair price for the services rendered by the practitioner under section 65 of the Contract Act. The only difficulty in so holding was that presented by the words "discovered to be void or has become void" in that section. This difficulty has been removed by the Privy Council by its decisions in *Harnath Kunwar* v. *Indar Bahadur Singh*[12] and *Annada Mohan Roy* v. *Gour Mohan Mullick*[13] where their Lordships apply the section to a case of *ab initio* void agreements and consider that the section is satisfied by holding that the agreement is discovered to be void at the very inception.

4. A.I.R. 1929 Lah. 742. 7 (1915) I.L.R. 43 C. 790 at 827.
8 (1926) I.L.R. 54 C. 189. 9. (1903) 1 K.B. 772
10 A.I.R. 1930 Lah 362 at 364.
11. (1929) I.L R. 53 M 309: 57 M.L J. 756
12 (1922) L.R. 50 I.A. 69: I L.R. 45 A. 179: 44 M.L.J. 489 (P C.).
13. (1923) L.R. 50 I.A. 239. I.L.R 50 C 929: 45 M.L.J. 617 (P.C.).

This seems to be a satisfactory solution of the question. It would apply equally to artificial with natural persons with this distinction that if the benefit is one which is *ultra vires* of the Corporation to receive and there is no means of tracing it to the assets of the Corporation even in the extended sense in which that doctrine is taken in *Sinclair* v. *Brougham*[14] the Court may be powerless to direct the restoration for, in that case, there is no benefit taken by the Corporation because none can be taken having regard to its statutory powers. If the materials supplied are found with the Corporation or the money has got into its coffers, the Court may direct return of such materials or such money but it cannot direct compensation for labour done which can only be done by imposing upon the Corporation a benefit which it is not competent for it to take. There is no such difficulty in the case of private parties. Private parties are under no such disability and Courts can always direct them to restore the benefit. Section 65 would not apply to cases where there never could be a contract between the parties (*Mohori Bibee* v. *Dharmodas Ghose*[15]), that is to say, it excludes cases of infants and of Corporations in respect of matters which are *ultra vires*. If the subject-matter is *intra vires*, then there is no difficulty in applying the section.

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14 (1914) A.C. 398
15 (1902) L.R. 30 I.A. 114. I.L.R. 30 C 539 at 548 (P.C.)

BAL KRISHNA SHARMA *v.* PAIJ SINGH, I.L.R. 52 All. 705.

The question in this case was whether lands assigned for the maintenance of a Hindu widow are transferable. Their Lordships hold, we think, rightly that they are. They distinguish cases on attachment which is governed by section 60, Civil Procedure Code, cl. (*n*). Their Lordships are of opinion however that if the grant is without right of alienation it might stand on a different footing for then the case might come within section 6, cl. (*d*). The case fell to be decided under the unamended Transfer of Property Act. Under section 6 of the Act as amended "a right to future maintenance, in whatsoever manner arising secured or determined," cannot be transferred. The law seems thus to be approximated to S. 60, cl. (*n*) under which a grant for maintenance to a widow is not attachable: see *Rajendra Narain Singh* v. *Sundara Bibi.*[1]

A further question arose in the case as to whether the lands so assigned were forfeited on re-marriage where re-marriage is permitted under the caste rules. The view of the Madras High Court as expressed in *Murugayi* v. *Viramakali*[2] and reaffirmed in *Vitta Tayaramma* v. *Chatakondu Sivayya*[3] is that she will forfeit. The same is the view of the Bombay and the Calcutta High Courts: see *Tikum Singh* v. *Sheo Ram Singh*[4] and *Vithu* v. *Govinda.*[5] The Allahabad High Court has been taking a different view though the correctness of that view was doubted in *Mula* v. *Partab.*[6]

Right to recover mesne profits apart from any interest in land has been held not to be assignable in a series of cases, *Seetamma* v. *Venkataramanayya,*[7] *Jai Narayan Pande* v. *Kishun Dutta Misra*[8] and *Durga Chandra Roy* v. *Koilash Chander Roy,*[9] though Mr. Justice Sadasiva Aiyar in *Venkatarama Aiyar* v. *Ramasami Aiyar*[10] and Mr. Justice Mukerjee in *Emperor* v. *Angad*[11] would seem to question the correctness of those decisions. Whether the same rule should apply to mesne profits accruing before the sale or transfer of the land when there is a transfer of

1. (1925) L.R. 52 I.A. 262: I.L.R. 47 A. 385· 49 M.L.J 244 (P.C.)
2. (1877) I.L.R. 1 M. 226.
3. (1918) I.L.R. 41 M 1078: 35 M.L.J. 317 (F.B.).
4. (1891) I.L.R. 19 C. 289 (F.B.)
5. (1896) I.L.R. 22 B. 321 (F B.)
6. (1910) I.L.R. 32 A 489.
7. (1913) I.L.R. 38 M. 308. 25 M.L.J. 410
8. (1924) I L.R. 3 Pat 575
9. (1897) 2 C.W.N. 43.
10. (1920) I.L.R. 44 M 539. 40 M.L.J. 204.
11. A.I.R. 1929 A. 69.

the land also there seems to be a difference of opinion: *Seetamma* v. *Venkataramanayya*,[7] *Chandrasekaralingam* v. *Nagabhushanam*,[11] *Muthu Hengsu* v. *Netravathi Naiksavi*[13] taking one view, Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar *obiter* in *Venkatarama Aiyar* v. *Ramasami Aiyar*,[10] *Monmatha Nath Dutt* v. *Mati Lal Mitra*,[14] *Emperor* v. *Angad*[11] taking the other view. The English rule as laid down in *Chapman* v. *Leach*[15] would seem to be in accordance with the latter view. But as pointed out by Mr. Justice Ramesam in *Chandrasekaralingam* v. *Nagabhushanam*[11] there is considerable difference between the English law and the Indian in this matter. The English rule would not seem to prohibit the assignment of the damages that might be obtained in an action for slander. See *Glegg* v. *Bromley*[16] referred to in *Subhadrayamma* v. *Venkatapati Raju*[17] if the objection on the ground of champerty or maintenance is got rid of. Assignment of *spes successionis* is not prohibited by English Law. The common law prohibitions are easily got rid of by the rule of Equity as to assignment of non-existent property. This course is not open according to the Privy Council in this country. *Ananda Mohan Roy* v. *Gour Mohan Mullick*.[18] Having regard to section 8 of the Transfer of Property Act, as an incident of a transfer of property only future rents and profits pass. Judges who take the other view would seem to read into the words in the absence of a contract to the contrary, the right to include past mesne profits as incidental or subsidiary to the transfer. The reasoning is not satisfactory. Right to past rent of course stands on a different footing from the claim for mesne profits. The right to rent already accrued is a debt and is assignable as an actionable claim. A right to mesne profits is substantially a claim for damages.

BALDEO PRASAD *v.* ARYA PRITI NIDHI, I.L.R. 52 All. 789.

No doubt where the rules of the religious society to which a Hindu belongs insist Viraja Homam, etc., as essential for attain-

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7 (1913) I.L.R. 38 M 308· 25 M.L.J. 410
10. (1920) I.L.R. 44 M 539 40 M.L.J. 204
11 A.I.R. 1929 A. 69. 12 (1927) 53 M.L.J. 342
13 (1920) 12 L.W. 44. 14 (1928) 33 C.W.N. 614.
15 (1920) 1 K.B. 339. 16. (1912) 3 K.B. 474.
17. (1924) L.R. 52 I.A. 1: I.L R. 48 M 230: 47 M.L.J. 93 (P.C.)
18. (1923) L.R. 50 I.A. 239: I.L.R. 50 C 929: 45 M.L.J. 617 (P.C.)

ing the status of sanyasi, it is right to hold that so long as those ceremonies are not performed, he would not attain that status. We do not quite see why if the sect to which the party belongs does not require such ceremonies or contemplates other ceremonies, in such a case compliance with the conditions laid down by such society should not suffice for the purpose. In a Madras case, *Sambasiva Pillai* v. *Secretary of State*[1] a Sudra ascetic is recognised though the Hindu Law proper does not recognise one such. The Hindu Law is very tolerant of heretical sects and would permit them the observance of their own rules.

MA NYEIN YONE *v.* P. D. PATEL, *Receiver to the Estate of Hajee Yacob Ali*, I.L.R. 8 Rang. 423.

The question for decision in this case was whether a person who was allowed to appeal as a pauper but whose appeal was dismissed, could file an application for review of the appellate judgment also in *forma pauperis*. The learned Judges hold that a review is something different from suits and appeals, that the Code while it has expressly provided for leave to litigate in *forma pauperis* in the case of suits (O. 33) and appeals (O. 44) has made no provision for cases of revision and review and as such the Court has no power to grant leave to apply in *forma pauperis* in those cases. S. 151, Civil Procedure Code, has been invoked often to fill up lacuna in the Code whenever justice of the case demanded it, provided it did not conflict with any specific provision in the Code but it is very doubtful if the Court can invoke the aid of S. 151, Civil Procedure Code, when it affects the Court Fees Act (see In re *Maharaja of Venkatagiri*[1-a] and In re *Vaithilinga Pandara Sannadhi*[2] or when it is a case where the question has been before the legislature and it has designedly or not restricted it to certain cases. See, e.g., *Neelaveni* v. *Narayana Reddi*,[3] where the Madras High Court held that inherent power cannot be invoked to set aside an *ex parte* decree. A contrary view is taken in Allahabad and Bombay. *Lalta Prasad* v. *Ram Karan*,[4] *Bilasrai Lakshminarayan* v *Cursondas Damodardas*[5] and *Maung Saw* v. *Ma Bwin Byu*[6]. In *Jagadanand Asram* v. *Rajendra Roy*,[7] *Ramkishen Lal*

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1 (1921) I.L.R. 44 M 704 41 M.L J. 109
1-a. (1929) 58 M L.J. 510. 2 (1929) 58 M.L.J. 521
3 (1919) I L.R. 43 M 94. 37 M L.J. 599 (F B.)
4 (1912) I.L R. 34 A 426 5 (1919) I.L.R. 44 B 82
6 (1925) I.L R. 4 Rang. 18 7. (1912) 17 C.L J. 381.

v. *Manna Kumri*[8] and *Amba* v. *Srinivasa Kamathi*[9] it was held that the High Court has no power to grant leave to appeal to the Privy Council in *forma pauperis*. The case under review begins by stating that there is no case in which permission was granted to apply for review in *forma pauperis*. But in *Umda Bibi* v. *Naima Bibi*[10] permission was granted to file a review application in *forma pauperis* to review a judgment in a suit and that is cited in Sir Mulla's Civil Procedure Code without comment. The reasoning therein, if correct, will equally apply to the case of a review of an appellate judgment. It may not be permissible to speculate as to the possible intention of the legislature from the injustice and hardship that may result from holding one view or the other, but the main ground of the judgment in *Umda Bibi* v *Naima Bibi*[10] is that it is "one of the incidents of a suit that a party aggrieved by a decree or order in that suit may under certain circumstances present an application for review" and that therefore it is "a proceeding connected with the suit within the meaning of S 410" (now O. 33, R. 8). This is only another way of stating that review is in a sense a continuation of the suit (or appeal). That reasoning may not apply to the case of "revision," as in that case even the forum changes.

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8. (1917) 3 Pat L J 179 9 (1918) I L.R. 42 M 32: 35 M.L J. 258.
10 (1898) I.L.R. 20 A. 410

JAHANDAD KHAN *v.* ABDUL GHAFUR KHAN, L.R. 57 I.A. 273: I.L.R. 11 Lah. 638: 59 M.L.J. 399 (P.C.).

It is well established that a plaintiff who relies on a title by adverse possession must clearly establish that his possession is adequate in quantity, in publicity and in extent to show that it is possession adverse to the competitor. In the case of uncultivated jungle land there is special difficulty in establishing this. In the decision under notice, the Privy Council reversed the finding of the Judicial Commissioner and restored that of the first Court. The title was clearly found to be with the defendant, as a result of a prior litigation between the parties which was *res judicata*. The error into which the Judicial Commissioner fell was in ignoring the presumption that possession follows title where it is undetermined or ambiguous. Merely because the evidence for the plaintiff was more worthy of credit than that for the defendant, where both sides had given evidence, he thought that he should find for the plaintiff. This of course was an error as the plaintiff had to establish affirmatively his exclusive possession for the statutory period as a fact. As pointed out by the Privy Council in *Rajkumar* v. *Gobind Chunder*,[1] where evidence of possession by the plaintiff is opposed by *equally strong* evidence on the part of the defendant, it is legitimate to the Court to apply the presumption that possession follows title. The Indian Courts have no doubt held that the presumption cannot be acted upon where the evidence of possession on both sides is equally unworthy of credence. *Shiva Prasad* v. *Hira Singh*[2] and *Rakhal Chandra* v. *Durga Das*.[3] If evidence of possession is not unworthy of credence but is merely weak or unsatisfactory (but credible) the presumption should in a proper case be allowed to prevail. See *Matuk Singh* v. *Tian Sahu*.[4] The onus of proof that lay on the plaintiff in the case could not therefore be held to have been discharged merely because the evidence for the plaintiff was more worthy of credit than that for the defendant. Exclusive possession of the required character must be found as a fact on the whole of the evidence before the plaintiff can establish a title by adverse possession.

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1. (1892) L.R. 19 I.A. 140· I.L.R. 19 C. 660 (P.C.).
2. (1921) 62 I.C. 1 (F.B.)
3. (1922) 26 C.W.N. 724.
4. (1922) I.L.R. 2 Pat 1.

SHALIG RAM *v.* CHARANJIT LAL, L.R. 57 I.A. 282: I.L.R. 11 Lah. 645: 59 M.L.J. 437 (P.C.).

This decision must be taken to be an authority for the view that the expression *waris* translated as "heirs" is a term of sufficient amplitude to confer full rights of ownership without any further explicit language conferring powers of free alienation, etc., even though it is used in connection with Hindu females as objects of the gift. It is not, however, clear whether their Lordships would hold that the fact that the donee is a Hindu widow would not by itself amount to a circumstance to indicate in the context that the intention of the donor was only to limit her interest to a limited estate. In the particular case the donees were not merely the Hindu widows but also a daughter-in-law and all three were given properties jointly as heirs. Whether their Lordships would have come to the same conclusion if the daughter-in-law also were not a joint donee, is by no means clear. One does wish that the judgment of the highest tribunal should be fuller in the portion which deals with the *ratio decidendi*, having regard to the importance and consequences of their Lordships' pronouncements.

MT. BOLO *v.* MT. KOKLAN, L.R. 57 I.A. 325: I.L.R. 11 Lah. 657: 59 M.L.J. 621 (P.C.).

The main point in this case was one of limitation. Their Lordships hold that Art. 120 of the Limitation Act did not stand in the way of the respondent's claim. The judgment holds that there can be "no right to sue" within the meaning of the third column of Art. 120 until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. Applying this test, it was held on the findings of fact accepted by their Lordships that the right to sue accrued to Mt. Koklan only within six years of the suit as there was no *clear* denial of her right till 1922, the year of the previous suit. It may be noted that in *Jitendra Nath Ghose* v. *Manmohan Ghose*[1] the same view had been taken although the proposition is not stated in so many words. Their Lordships held in that case that the plaintiffs who brought a substantive civil suit for a declaration that certain rent decrees obtained by the defendant landlord against certain third parties under the Bengal Tenancy Act and which he wanted to

1. (1930) L.R. 57 I.A. 214: I.L.R. 58 C. 301: 59 M.L.J. 607 (P.C).

execute against the tenure which had come to be vested in the plaintiffs by valid transfers from the original tenants, were not binding on them and for an injunction restraining the defendant from bringing the tenure to sale, were in time under Art. 120, as they filed the suit within six years from the date when the defendant first applied for sale of the tenure, though more than six years had elapsed from the dates of the respective invalid decrees. It has even been held by the Privy Council that there can be no right to sue accruing to a plaintiff who has no right of action at all in respect of a subject-matter unless and until a prior condition is satisfied such as the grant of a certificate under the Pensions Act in respect of a right to obtain a malikana, and limitation will start to run only when such a condition is satisfied as, for instance, in the illustration by obtaining the certificate. See *Mt. Jaggo Bai* v. *Utsava Lal.*[2] It would thus seem that the expression "when the right to sue accrues" is even wider than the expression "when the cause of action accrues". For more recent applications of the test laid down in the judgment, see *Annamalai Chettiar* v. *Muthukaruppan Chettiar*[3] and *Raj Kumar Gobinda Narayan Singh* v. *Sham Lal Singh.*[4]

HAKIM SYED MAHOMED TAKI *v.* RAI FATEH BAHADUR SINGH, I.L.R. 9 Pat. 372 (F.B.).

It is somewhat curious that there should be so little authority on the point involved in this Full Bench decision though it is one which must arise very frequently. The question is whether O. 22, R. 3 and R. 4 apply to appeals under S. 47 against orders in execution of decrees The majority hold that they do not apply by virtue of the operation of O. 22, R. 12, while Das, J., who dissents, holds that they do and that O. 22, R. 12 is confined only to proceedings in the Court which passed the decree or in the Court to which it is sent for execution and that it does not cover proceedings in the appellate Court. We are inclined to agree with the views of Das, J. The scheme of the Code points to a clear distinction between suits, appeals and execution proceedings. The language of O. 22, R. 12 may be wide enough to include even appellate proceedings in execution, which also are in a sense execution proceedings, as they originate from them. But notwithstanding this, the intention of

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2 (1929) L.R. 56 I A. 267· I.L.R. 51 A. 439: 57 M L.J. 160 (P C)
3 (1930) I.L.R. 8 R 645· 60 M.L.J. 1 (P.C.).
4. (1931) 35 C.W.N. 521 (P C).

the legislature seems to be that all appeals should be governed by O. 22, Rr. 3 and 4. The consequence of the view that abatement rules do not apply to execution proceedings is to give three years time for the legal representatives to come on record under Art. 181, as the shorter period of three months is inapplicable. The view of the Madras Court in *Palaniappa Chettiar* v. *Valliammai Achi*[1] that no legal representative can continue the execution application is practically overruled by later decisions. See *Venkata Lakshmamma* v. *Seshagiri Rao*.[2] It could hardly have been the intention of the legislature that a distinction should be made between appeals from a decree and appeals against execution orders, in the matter of the period of time within which a legal representative of a deceased appellant or respondent should come on record. On the whole we think, while the majority view cannot be said to be an impossible one on the language of the Code, the more sound view is that of the dissenting Judge.

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1 (1926) I.L.R. 50 M. 1· 51 M.L.J. 745
2. (1931) M.W.N. 48

NATHA NATHURAM *v.* MEHTA CHOTALAL, I.L.R. 55 Bom. 1.

This decision is one of considerable interest by reason of the discussion of several important questions relating the law of marriage and inheritance in Hindu Law. The first question was about the validity of the marriage between persons belonging to different castes among the Hindus. So far as regards marriages between members of different sub-castes of the same main caste are concerned, it has been held, by all the High Courts and by the Privy Council, that such marriages are valid under the Hindu Law. See *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*,[1] *Ramamani Ammal* v. *Kulanthai Natchear*,[2] *Upoma Kuchain* v. *Bholaram Dhubi*,[3] *Biswanath Das Ghose* v. *Shorashibala Dasi*,[4] *Fakirgauda* v. *Gangi*,[5] *Mahantawa* v. *Gangawa*,[6] *Har Prasad* v. *Kewal*[7] and *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik*.[8] Though these cases related to inter-marriages between various sub-castes of the Sudra caste, no different considerations would seem to arise in cases of marriages between members of different sub-castes of other castes. When we come to cases of marriages between members of different castes, we find great diversity of opinion among writers and Judges. As pointed out by Mr. Justice Shah in *Bai Gulab* v. *Jiwanlal Harilal*[9] and Mr. Justice Patkar in the case under notice the Smriti writers certainly recognised as legal, marriages between males of a higher caste and females of a lower caste, though marriages in the reverse order were not considered legal. But learned writers like the late Sir Gurudas Bannerjee and Mr. Mayne have expressed their view in general terms that inter-caste marriages may not be legal at the present time and decisions are not wanting in support of their view. See *Padam Kumari* v. *Suraj Kumari*,[10] *Melaram Nudial* v. *Thanooram Banuun*[11] where even *anuloma* marriages were held to be not valid under the Hindu Law apart from custom. *Pratiloma* marriages, however, have always been held to be illegal. *Bai Kashi* v. *Jamnadas*.[12] The whole matter came

1. (1869) 13 Moo.I.A. 141.
2. (1871) 14 Moo.I A 346.
3. (1888) I.L.R. 15 C. 708.
4. (1921) I.L.R. 48 C. 926.
5. (1896) I.L.R. 22 B. 277.
6. (1909) I.L.R. 33 B. 693.
7. (1924) I.L.R. 47 A. 169
8. (1894) I.L.R. 17 M 422.
9. (1921) I.L.R. 46 B 871
10. (1906) I.L.R. 28 A. 458
11. (1868) 9 W.R. 552
12. (1912) 14 Bom L.R. 547.

under review in *Bai Gulab* v. *Jiwanlal Harilal*[9] and the learned Judges held in that case that the view of the Smriti writers in favour of the validity of *anuloma* marriages held good at the present day, though we do not find in the judgment any reference to the cases mentioned above. The learned Judges in the case under notice have followed the decision in *Bai Gulab* v. *Jiwanlal Harilal*[9] and upheld the validity of the marriage of a Brahmin with a Sudra woman. What is perhaps more interesting is that a single Judge of the Madras High Court has in a recent case not only held that *anuloma* marriages are valid at the present day under the Hindu Law following *Bai Gulab* v. *Jiwanlal Harilal*,[9] but gone further and observed, though *obiter*, that he should not be understood as saying that *pratiloma* marriages are invalid. See *Ratansi D. Morarji* v. *The Administrator-General of Madras*.[13] It may be mentioned in this connection that there are no considerations peculiar to the Bombay school of Hindu Law in favour of inter-caste marriages which would be inapplicable to the other parts of India, because the authorities relied on are Manu and Yagnavalkya and the commentaries of Vignaneswara and no special rule of Nilakantha in the Mayukha, solely applicable to Bombay.

The second question that has been considered in the case is the right of succession of the son born to a Brahmin by his Sudra wife in respect of his father's estate. The matter is so fully dealt with in the inheritance portion of Mitakshara, Chapter I, section 8, that there is no need to go elsewhere for it. It has been laid down there that such a son would take only one-tenth of his father's estate; and the learned Judges in the present case have adopted it. There is, however, one restriction in that section to the effect that such a son would not take a share in his father's immoveables. It is not clear whether the learned Judges would adopt that restriction also.

The third question and the one that arose directly in the case was the right of such a son to collateral succession. In the present case, the succession was to the properties of his father's brother. The learned Judges have followed the analogy of the succession to his father's properties and held that he would take only a tenth share of the inheritance of his uncle and the other nine-tenths would go to the other though remoter sapindas of the deceased. As one of the learned Judges has observed, this matter is by no means free from difficulty.

9 (1921) I.L.R. 46 B 871

13 (1928) 55 M.L.J. 478.

The Mitakshara has only laid down that a son by a Sudra wife will take a tenth share of his father's effects. The chapter has only to do with the succession to a father's estate and deals mainly with the competition between the sons of wives of different castes. If once it is conceded that he is the legitimate son of his father, it is difficult to see why his rights should be so cut down when he inherits to collaterals, in the absence of anything in the texts to that effect. Instances are not wanting of classes of sons who take a restricted share of their father's estate in competition with a superior class of sons but take the whole inheritance in the case of collaterals. Reference may be made in this connection to the case of adopted sons who take a smaller share along with *aurasa* sons but take the whole inheritance of collaterals. See *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*.[1] The case of an illegitimate son who does not inherit to collaterals is hardly a parallel for the very reason that he is not legitimate and not a son in the strict sense of the term *aurasa* and comes in at all as an heir only by reason of special texts.

JALBHAI CURSETJI *v.* JERBAI HORMUSJI, I.L.R. 55 Bom. 145.

In this case an application was made before a single Judge of the Bombay High Court for orders as to who was to celebrate the thread marriage of a Parsi minor girl who was a ward of Court. Against the order passed by the learned Judge, an appeal was taken to a bench of two Judges who reversed the order of the single Judge. While there may be nothing wrong on the merits of the order passed on appeal, it is somewhat difficult to follow the learned Judges when they observe that though there may be no right of appeal under the Guardian and Wards Act or clause 15 of the Letters Patent, there is a right of appeal under the inherent jurisdiction in a matter of that sort. We believe it has always been well understood that an appeal does not exist in the nature of things and that a right of appeal from any decision of any tribunal must be given by express enactment. *See per* Bramwell, L.J., in *Sandback Charity Trustees* v. *North Staffordshire Railway Co.*[2] approved by the Privy Council in *Rangoon Botatoung Company, Ltd.* v. *The Collector, Rangoon.*[3] Reference may also be made to the same effect to the decision of the Privy Council in *Minakshi* v. *Subramanya.*[4]

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1 (1915) L.R 43 I.A. 56 I L.R. 40 B 270. 30 M L.J. 193 (P C)
2. (1877) 3 Q.B.D. 1
3. (1912) L R. 39 I.A. 197· I L.R. 40 C. 21 at 27 23 M L.J. 276 (P.C)
4. (1887) L.R. 14 I.A. 160: I.L.R. 11 M 26 (P.C).

MAHANT SHANTANAND GIR *v.* MAHANT BASUDEVANAND GIR, I.L.R. 52 All. 619 (F.B.).

This case covers a wide range of points. The initial question of fact was as to whether the advocate was guilty of contempt of Court or abuse of process of the Court in applying to attach the security furnished by the judgment-debtor for costs of the respondent in the Privy Council. The motive of the party apparently was to burke the appeal to the Privy Council and that motive appeared to be known and shared in by the advocate judging from his arguments before the Court of First Instance and the admissions before the appellate Court. All this seems to us to be beside the point; there is no reason as the majority hold why the party should not attach the security amount. The attachment will not lead to the immediate payment of the money to the decree-holder but would entitle him to the ultimate balance that might remain after satisfying the claims of the respondent. We should also think that the presentation of such a petition could not amount to any professional misconduct on the part of the advocate concerned. It would be adding a new terror to the advocate's life in this country if he should be held responsible not for any false statement or dishonest suppression of facts or his being a party to the putting forward of a false or vexatious claim but for the possibility of the Court by reason of its ignorance of law making a wrong order in the absence of a warning by him. We think, where a party is entitled to the relief claimed and there is no suppression of fact, the motives, desires and possibilities should be altogether excluded from consideration.

The further questions were whether the High Court could having regard to the reprehensible conduct of the practitioner in urging that the security money should be entirely paid over to the decree-holder with a view to burke the appeal to the Privy Council, order the advocate concerned to pay the respondent the loss sustained by him by the unreasonable or improper conduct of the advocate. On this point three Judges hold that the High Court has power while the others hold that even if the High Court had the power before, that power is taken away by the Bar Councils Act and the only course open to the Court now is to refer the matter to the Bar Council and to impose such penalties as that Act contemplates if the advocate is found guilty. They hold that the Court has no power to award as costs an amount higher than the expenses actually incurred and awardable under the rules merely as a punishment or penalty. *Willmoth* v.

Barber.[1] They also hold that though the powers of the Court to order payment of costs under S. 35 may not be limited to parties, it does not extend to advocates. That would seem to follow from the fact that admittedly the Subordinate Courts do not possess such power. In a case in India where the order was made (*Muruga Chetty* v. *Rajasami*[2]) it was expressed to be done in the exercise of the disciplinary jurisdiction of the Court and such disciplinary jurisdiction is now regulated by the Bar Councils Act. Viewing the conduct of the advocate as constituting a contempt, they hold that the contempt of Courts Act should govern the matter and steps should be taken under that Act. They hold further having regard to cl. 14 of the Letters Patent corresponding to cl. 21 of the Madras Letters Patent, the High Court could not make an order as to costs which the Lower Court could not do under the law applicable to such Court. If the Lower Court could not make the order, the High Court could not do it either. As regards the costs before it, assuming it had wider power, there was no impropriety in the conduct of the appeal as only proper grounds were taken in the appeal. They further hold that the wide powers held by the Supreme Court of Calcutta and inherited by the Calcutta High Court are not inherited by the Allahabad High Court and its powers are only such as are expressly conferred on it or are incident to its position as a Supreme Court of Appeal or as a Court of Record. On the whole, we think, it is advisable that these vague and undefined powers are defined and made easily ascertainable so that they may not be arbitrarily or capriciously exercised. In England there are two classes of practitioners, the solicitors and advocates, to whom different rules apply. If the solicitor acted on counsel's advice he is protected. It is difficult to say to what extent in a particular transaction the advocate in this country is discharging the solicitor's function and to what extent, the advocate's. Again, the Court exercises much larger powers both against the solicitor and in his favour. It declares a charge over the proceeds of the litigation in his favour, it canvasses agreements in his favour and passes orders in respect of them. The Court in the mofussil has no such power nor does the High Court seem to have such power in the case of advocates.

One of the questions that incidentally arose in this case was as to whether the Statement of Objects and Reasons could be looked into in aid of the interpretation of a statute. Here also

1 (1881) 17 Ch.D. 772. 2 (1912) 22 M.L.J. 284.

the majority hold that it cannot be while the minority hold the contrary. The judgment is given without advertence to the judgment of the Privy Council in *Krishna Aiyangar* v. *Nallaperumal Pillai*,[1] where their Lordships expressly say "no statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of words" which would seem to conclude the matter.

MOTILAL *v.* UNAO COMMERCIAL BANK, LTD., I.L.R. 52 All. 851: 59 M.L.J. 661 (P.C.).

In this case the munib of a mercantile firm accepted some hundies and drew others in pursuance of a conspiracy between himself and a partner of the firm to defraud the firm and the question was whether such transactions bound the firm. The discounting banks had no notice of the conspiracy. It was alleged that the authority in fact given by the partner to the munib had been cancelled by the other partner but such cancellation was not proved. It was held by their Lordships that in the circumstances the transactions bound the firm—the implied authority of a partner in a mercantile firm to draw and accept bills on behalf of the firm being well recognised. (*Bunarsee Dass* v. *Gholam Hossein*[2]). The termination of the agent's authority does not under S. 208 of the Contract Act take effect as regards third persons before it becomes known to them and neither the agent's fraud (*see* S. 238, *Lloyd* v. *Grace*[3]) nor the fraud of the partner whose position is the same as that of the agent in this matter (S. 251, Ill. (*d*) particularly) is an exonerating factor in the absence of knowledge brought home to the party dealing with them.

[END OF VOL. LX.]

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1 (1919) L.R. 47 I.A. 33: I.L.R. 43 M. 550 at 565: 38 M.L.J. 444 (P.C.).
2. (1870) 13 M.I.A. 358.
3. (1912) A.C. 716.

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NOTES OF RECENT CASES.

Jackson, J. Cr. A. No. 391 of 1930.
27th November, 1930.

Indian Penal Code, S. 387—Offence triable by assessors—Tried by Jury—Effect on the right of appeal.

If an offence triable by assessors is erroneously tried by Jury, the accused has a right of appeal on facts, treating the charge to the Jury as the judgment, and the verdict of the Jury as the opinion of the assessors.

26 Mad. 243 (*n.*) : 6 M.L.J. 14 followed.

25 Bom. 680 distinguished.

V. L. Ethiraj and *M. Sriramamurti* for Appellant.

The Public Prosecutor for the Crown.

S.V.V.

Jackson, J. C.R.P. No. 691 of 1929.
28th November, 1930.

Civil Procedure Code (V of 1908), Order 2, rule 2—Subscription to chit fund payable in instalments—Whole amount recoverable on default—Suit filed after default to recover part of amount due—Subsequent suit for balance—Bar.

The plaintiff claimed as the assignee of a Karaswan's right in a chit fund, the subscriptions payable in a number of instalments by the defendant. By a document executed by the defendant in favour of the Karaswan, he made himself liable to pay all the future instalments at once in case he made default in the payment of any one instalment. The defendant having committed default the plaintiff sued him to recover a portion of the amount that had become payable and obtained a decree. Subsequently he brought another suit for the balance still due.

Held, that the later suit was barred by O. 2, R. 2, Civil Procedure Code.

(1929) M.W.N. 204 followed.

A. Swaminatha Aiyar for Petitioner.

K. Balasubramania Aiyar for Respondent.

B.V.V.

Madhavan Nair, J. S.A. No. 1583 of 1927.
1st December, 1930.

Fraud—Suit to set aside decree for fraud—Wilful suppression of fact which it was the duty of plaintiff to disclose—Defendant remaining ex parte—*Court, if can set aside the decree.*

Where a party obtains a decree in a suit in which the defendant is *ex parte* by deliberately putting forward a false case before the Court and by misleading it by suppressing a fact which it was his duty to disclose to the Court, such a decree can be set aside in a subsequent suit on the ground of fraud practised upon the Court by putting forward a case false to the knowledge of the plaintiff.

18 C.W.N. 447; 63 I.C. 712; 23 I.C. 976 followed.

Cases like 38 Mad. 203, 41 Mad. 743 where material evidence was suppressed or perjured evidence given distinguished.

Case-law discussed.

The unquestioned jurisdiction of a Court to set aside a decree on the ground of fraud is to be exercised with care and reserve.

41 Cal. 990 referred to.

P. Venkatramana Rao for Appellant.

P. Somasundaram for Respondents.

S.V.V.

Madhavan Nair, J. S.A. No. 1722 of 1927.
19th January, 1931.

Joint family—Father doing speculative business—Trade not inherited—Mortgage of family properties—Whether binding on minor sons.

A mortgage transaction entered into by a father cannot affect the interests of the minor sons in the joint family property, having regard to the finding, that the transaction was purely of a speculative character and did not in any way benefit the family.

52 M. 227 distinguished.

51 M. 711 relied on.

41 M. 824 referred to.

T. L. Venkatarama Aiyar for Appellant.

B. Sitarama Rao and *T. Nallasivam Pillai* for Respondent.

K.C.

Wallace and Krishnan Pandalai, JJ. A.S. No. 347 of 1929.
8th December, 1930.

Hindu Law—Widow—Continuance of her husband's trade—Mortgage to meet business debts—No pressure from creditors—Validity of mortgage—Portion of trade assets utilised in completing a godown begun by the husband—Proper decree to be passed.

A Hindu widow continued a grocery business which her husband had been doing and she associated as a partner with herself her son-in-law who had been attending to the business as a clerk during the husband's lifetime.

Held, that as the business was the main source of income to the family, it was within the power of the widow under the Hindu Law to continue the business and that liabilities properly incurred in connection with such business would be binding upon the estate and it made no difference in the circumstances that she continued the trade not by herself alone but in partnership with the son-in-law.

26 Bom. 206 and 28 M.L.J. 696 relied on.

But where she had mortgaged the husband's estate and raised money to meet a number of small items of debts due to various persons in connection with the business, there being however no evidence that there was any pressure from these creditors, held that the mortgage was not justified and was not binding upon the reversioners.

14 A. 426 and 21 A. 71 applied.

A portion of the trade assets had been utilised by the widow in completing a godown which the husband had commenced. Held, on the principle of the decision in 26 Bom. 206 that the mortgagee as a creditor of the trade, was entitled to a charge on the godown to a proportionate amount as indicated by the proportion between the amount spent thereon after the husband's death and the total value of the godown.

S. Varadachariar and *K. S. Champakesa Aiyangar* for Appellants.

K. V. Sesha Aiyangar and *T. R. Ramachandran* for Respondents.

S.V.V.

Madhavan Nair, J., S.A. No. 1895 of 1926.
9th December, 1930.

Specific Relief Act, Art. 41—*Transaction declared to be void—Compensation, when can be granted.*

An alienation by a Mahomedan mother was declared void as against the share in the estate of her minor sons, but good to the extent of her own share in the property. It was found that the minor plaintiffs benefitted by the sale as debts binding on the father's estate were paid off by that sale.

N.R.C.

Held, that 30 Cal. 539 is itself an authority for the proposition that, though a transaction is declared to be void, the Court may under S. 41, Specific Relief Act require the party to whom relief is granted to make compensation to the other party which justice may require.

7 Lah. 35 followed.

25 C.W.N. 258 relied on.

Case-law discussed. Leave refused.

B. C. Seshachala Aiyar for Appellants.

A. Visvanatha Aiyar and *A. Ramaswami Aiyar* for Respondents.

S.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. 394 of 1926.
15*th December,* 1930.

Limitation Act, Art. 182, *Cl.* (5)—*Unverified execution-petition—Vakil signing not aware of all the facts of the case—Application, if in accordance with law so as to support a later application for execution.*

An execution petition, which is not signed and verified by the decree-holder, but only signed by the vakil, who did not seem to be fully acquainted with the facts and circumstances of the case, cannot be said to be "in accordance with law," so as to support a later application for execution.

26 M. 101 followed.

31 M. 68 distinguished.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Respondent.

S.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. No. 238 of 1930.
17*th December,* 1930.

Civil Procedure Code, Order 21, *Rule* 89—*Execution sale—Judgment-debtor depositing money under Rule* 89—*Attachment before judgment between the sale and deposit—If attachment valid.*

In execution of his decree *A* purchased the suit properties in Court sale but before confirmation the judgment-debtor made the necessary deposit under O. 21, r. 89, by raising the amount by a private sale and the Court sale was thereupon set aside. Before the deposit but after the sale to *A, B* had those properties attached before judgment in his suit against the judgment-debtor.

Held, that the attachment was valid. By the mere sale the judgment-debtor did not lose all his interest in the properties before confirmation. Rules 86 and 87 indicate the meaning of the Code in this matter that the property is still the property of

the judgment-debtor, though on confirmation the title of the purchaser relates back to the date of the sale under S. 65.

1921 Mad. 498 and 44 Mad. 554 followed.

55 I.C. 526 distinguished on the ground that in that case as found from the records the sale had been confirmed.

The Munsif decided that the attachment was bad but on appeal the Subordinate Judge reversed and remanded it. On appeal to the High Court, it was contended that no appeal lay to the Subordinate Judge's Court.

Held, that even assuming that no appeal lay—without deciding it—the High Court could interfere with the order of the District Munsif direct in exercise of its revisional jurisdiction.

37 M.L.J. 100 followed.

Ch. Raghava Rao with *S. Rajaraman* for Appellant.

V. Suryanarayana for Respondents.

S.V.V.

Madhavan Nair, J. S.A. No. 2014 of 1927.
19th December, 1930.

Hindu Law—Suit for partition—Will and settlement by plaintiff before notice of suit was served—Whether valid.

S filed a suit for partition on 18th August, 1922, and on 15th September, 1922, settled some portions of his half share on two of his daughters and simultaneously executed a will with respect to the other properties. The summons in the suit was served on the co-sharers only on 16th September, 1922. *S* died on 1st April, 1924, pending the trial and the persons entitled under the settlement and the will were added as legal representatives after contest and a decree was passed for the half share in their favour.

Held, that inasmuch as severance is a matter of individual volition and does not depend on the assent of the co-sharers, it follows on principle that the severance can be brought about so far as the plaintiff is concerned by an assertion of his right to separate in the plaint. Notice to the other co-sharers of the plaintiff's intention to separate would be necessary to make the severance operative against them so that they may know that he is claiming his share of the joint family property from the date of the plaint and the severance is final; but it cannot be a condition precedent to bring about a severance of the joint family status so far as the plaintiff is concerned.

78 I.C. 256 followed.

39 M. 159; 39 A. 498; 45 M. 489; 50 Cal. 84 relied on.

Case-law discussed.

K. Rajah Aiyar and *K. Venkateswaran* for Appellant.

S. Rajagopalachari for Respondents.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ.
19th December, 1930.

C.M.P. No. 424 of 1930.

Civil Procedure Code, S. 109, *Cl.* (c)—*Substantial and difficult question of law—If sufficient.*

There was no specific authority covering the point raised and the question was also a substantial question of law and one of some difficulty. The value of the suit was below Rs. 10,000.

Held, by Madhavan Nair, J., that the existence of a question of law of some difficulty for decision is not itself a sufficient ground for a certificate under S. 109, Cl. (*c*), Civil Procedure Code, especially where the question raised is not likely to affect any large number of persons, nor likely to be a precedent governing numerous other cases.

42 M.L.J. 78 and 18 I.C. 302, distinguished.

Venkatasubba Rao, J. was not prepared to differ in the result although his inclination was the other way.

S. Varadachariar and *T. M. Ramaswami Aiyar* for Petitioners.

K. R. Rangaswami Aiyangar for Respondent.

S.V.V.

Jackson, J.
19th December, 1930.

Cr. R.C. No. 367 of 1930.

Criminal Procedure Code—Practice—Police investigating after a private complaint was taken cognizance of by the Magistrate—Police, if can investigate.

Merely because a private person has filed a complaint and that is taken cognizance of by the Magistrate, the jurisdiction of the police to investigate into the offence irrespective of the complaint, does not cease.

53 Bom. 339 not followed.

2 Pat. 379 approved.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Petitioners.

Ch. Raghava Rao and *T. Krishnamachariar* for Complainant.

The Public Prosecutor for the Crown.

S.V.V.

The Chief Justice, Sundaram Chetty and Stone, JJ.
8th January, 1931.

In the matter of *an Advocate.*

Evidence Act (*I of* 1872), *S.* 41—*Terms "legal character" and "specific thing"—Meaning—Declaration of right as creditor of insolvent—Whether constitutes judgment* in rem.

An order of an Appellate Court in an insolvency proceeding declaring a person as the creditor of the insolvent does not confer on the creditor a "legal character" within the meaning of S. 41 of the Indian Evidence Act and the adjudication does not amount to a judgment *in rem*. The term "legal character" in S. 41 means legal status.

Held, further, that the right to recover a debt is not a "specific thing" within the meaning of S. 41 and a decree declaring such a right does not have the effect of establishing the right absolutely, that is, as against the whole world and hence does not come under the definition of judgment *in rem*. The term "specific thing" in the section means tangible property.

46 M.L.J. 580 relied on.

16 M. 380, 39 M. 80, 43 C. 694 (P.C.) and 33 I.C. 798 referred to.

S. Duraiswami Aiyar and *K. Sankaranarayana* for *The Advocate-General* in support of the notice to Advocate.

T. M. Krishnaswami Aiyar, M. Venkatasubbiah and *G. A. Pais* for Advocate.

B.V.V.

Madhavan Nair, J.
9th January, 1931.

S.A. No. 1591 of 1927.

Indian Limitation Act, Arts. 61 *and* 120—*Joint family—Partition—Debts due to the family allotted to members of a branch—Member of another branch collecting money from the debtor—Unauthorised expenditure by him on behalf of other members—Suit for moneys paid on behalf of them—Whether barred.*

The father of defendants 1 and 2, the father of plaintiff and 3rd defendant were brothers and members of a joint family. After the death of the father of defendants 1 and 2, a partition was effected in 1917 whereby some moneys due to the family from a third person were allotted to the share of defendants 1 and 2. The plaintiff collected a portion of that amount due from the debtor on the unauthorised power to spend them for the funeral expenses of the defendants' father and for income-tax purposes. But the defendants 1 and 2 filed a suit against the debtor and got a decree in 1922. The debtor in his turn brought a suit against the plaintiff for the moneys collected from him, and got a decree in 1923. The plaintiff brought a suit against

N.R.C.

the defendants in 1924 for reimbursement of the amount disbursed by him on their behalf.

Held, that the moneys having been paid by the plaintiff on behalf of defendants in 1917 and the present suit being brought in 1924, Art. 61 and not Art. 120 of the Indian Limitation Act would be applicable and hence the plaintiff's suit was barred.

Ch. Raghava Rao for Appellant.

K. S. Desikan for Respondent.

K.C.

Madhavan Nair, J. S.A. No. 1666 of 1927.
9th January, 1931.

Indian Limitation Act, Arts. 142 *and* 144—*Suit for possession of waste land—Title and possession till date of trespass alleged—* Onus *of proving possession.*

In a suit for possession of waste land where the plaintiff alleges his title to the property and also specific possession till the date when the defendant trespassed upon the land, he cannot rely on the presumption that in the case of waste land possession must be deemed to be with the person who has title to the property and seek to apply Art. 144 of the Limitation Act and throw the *onus* of proving adverse possession on the defendant. To such a case Art. 142 applies and plaintiff has to prove possession within twelve years of the suit.

67 I.C. 673 followed.

The Advocate-General and *M. Venkatasubbiah* for Appellant.

S. Varadachariar, S. T. Srinivasagopalachari and *V. Ramaswami Aiyar* for Respondent.

K.C.

Madhavan Nair, J. C.R.P. No. 1207 of 1927.
16th January, 1931.

Madras Local Boards Act (XIV of 1920), *S.* 225—*Scope—Suit for declaration that levy of property tax was illegal and for refund—Notice if necessary.*

S. 225 of the Madras Local Boards Act applies only to suits for compensation or for damages. A suit for a declaration that the assessment of plaintiff to professional tax by the defendant Union Board is illegal and for recovery of the tax so paid is not one for compensation or damages and, therefore, does not require notice under the section.

32 M. 271 relied on.

M. S. Vaidyanatha Aiyar for Petitioner.

K. Bhashyam Aiyangar for Respondent.

B.V.V.

The Chief Justice, Reilly and
Sundaram Chetty, JJ. *In the matter of* a first grade Pleader.
19*th January,* 1931.

Legal Practitioners Act (XVIII of 1879), *S.* 12 (*b*) *and* (*f*) —*Improper conduct—Pleader obtaining adjournment of case on grounds known to be false—Professional misconduct—Duty of legal practitioner to Court.*

Where a Pleader repeatedly applied for the adjournment of a case pending before a Sub-Magistrate on the ground that his client intended to apply to the High Court for a transfer of the case but it appeared that the pleader knew or had reason to believe that the purpose for which the adjournment was applied for would never be carried out,

Held, that under the circumstances the pleader was guilty of professional misconduct in having attempted to gain for his client an advantage by dishonest means.

Per *the Chief Justice.*—"It is not the duty of a legal practitioner to blindly follow every instruction his client gives him. The pleader not only has got a duty towards his client but has also got a duty towards the Court and it is his duty to see that the case is fairly and honestly conducted. He must not trick or deceive the Court or attempt to gain for his client an advantage by dishonest means. He must not ask for adjournment for his client when he knows that the reason put forward is untrue or has reason to believe to be untrue. He must apply only when he believes the reason to be well founded."

The Advocate-General in support of the "Notice" to Pleader.

L. A. Govindaraghava Aiyar and *P. S. Ramachandra Aiyar* for Pleader.

B.V.V.

Wallace and Stone, JJ. A.S. No. 200 of 1929.
19*th January,* 1931.

Evidence Act (I of 1872), *S.* 92—*Mortgage deed—Stipulation for default rate of interest—Subsequent oral agreement waiving default—Plea of discharge—Proof—Permissibility—Contract Act* (1872), *S.* 63.

A mortgage deed provided for interest at 7½ per cent. per annum on the principal amount. It further provided that the mortgagor should pay interest at 9 per cent. per annum in case the mortgagor committed default either in the regular payment of interest or in the repayment of the principal amount at the end of two years. The mortgagor committed default and the question as to interest payable was raised in a proceeding for apportionment

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of certain compensation amount. The mortgagor pleaded a subsequent oral agreement whereby the mortgagee agreed to waive the default rate of interest both for the past and for the future. He further averred that payments had been made in pursuance of the alleged agreement and that the entire claim for interest had thus been discharged.

Held, that S. 92 of the Indian Evidence Act was not a bar to the plea of discharge in pursuance of the agreement being raised as a defence, because there was no variance of the original contract but a mere remission of part payment of the debt. The contract pleaded was such as that specified in S. 63 of the Contract Act and was enforceable.

58 M.L.J. 503 approved.

52 M.L.J. 224 explained.

26 M. 195, 27 M. 368, 30 M. 231, 42 M. 42 (F.B.), 44 Bom. 55 and 55 M.L.J. 1 referred to.

K. S. Krishnaswami Aiyangar and *T. D. Srinivasachari* for Appellant.

P. Visvanatha Aiyar for Respondents.

B.V.V.

Wallace and Stone, JJ. A.S. Nos. 395 and 396 of 1928.
22nd January, 1931.

Appeal—Land Acquisition Act—Dispute as to title between two claimants—Decision by Chief Judge of Small Causes—If an award or a decree—Appeal to High Court, if lies.

Where the Government constituted the Chief Judge of the Small Cause Court as the officer to perform the functions of a "Court" under the Land Acquisition Act to hear and decide disputes between parties to the land acquisition proceedings, the Chief Judge is acting as a special judicial officer sitting in a Special Court specially constituted and not as a Principal Civil Court of Original Jurisdiction within the meaning of S. 3 (*d*) of the Act.

Where there was no dispute as to the quantum of compensation payable but only as to which of two claimants was entitled to it, the decision of the Court on the question is a "decree" and not an "award".

45 Mad. 320 applied.

A right of appeal must be expressly given by statute, 39 I.A. 197: 40 Cal 21: 23 M.L.J. 276 (P.C.) and as under S. 54 a right of appeal is given only from an award, no appeal lies to the High Court where there is no dispute as to the award but only as to the persons entitled to it. Appeal is given only against awards and not decrees of the Special Court.

T. C. A. Anandalwan, T. C. A. Bhashyam and *M. E. Rajagopalachari* for Appellant.

C. Narasimhachariar and *R. Rangaswami Aiyangar* for Respondent.

S.V.V.

Madhavan Nair, J. S.A. No. 2286 of 1927.
26th January, 1931.

Will—Construction—"On the death of both of us you should perform our obsequies and enjoy our properties absolutely"—"Will shali come into force after my life-time"—Effect of the two clauses —If legatee entitled to possession on testator's death.

By his will addressed to the devisee a testator stated as follows: "I have no sons or daughters, but only a wife. We have come under your protection. You are rendering us all *upacharams* (services). You should protect me and my wife in this very manner and *on the death of both of us* you should perform our obsequies and enjoy our properties with right to alienate by means of gift and sale. *This will shall come into force after my life-time*". The devisee was in possession of the properties. It was contended that the property in question vested in the devisee on testator's death and that the widow is entitled only to be maintained by him.

Held, that the vesting in the devisee takes effect only after the death of the testator and his widow. It cannot be held that there is no vesting of the properties in the widow. The vesting in her is implicit in the provision which makes the vesting of them in the devisee conditional on the death of the testator and his wife.

38 Mad. 369 at 373 distinguished.

G. N. Tirumalachari for Appellant.

T. R. Arunachalam for Respondent.

S.V.V.

Ramesam, J. S.A. No. 2276 of 1927.
27th January, 1931.

Natural mother—Whether guardian de jure*—Suit by an adopted son to recover properties alienated by natural guardian—Whether barred by limitation.*

The plaintiff who was given away in adoption to another, sued to recover properties purported to have been alienated by his natural mother acting as his guardian. On the question whether under the circumstances the natural mother can be regarded as a *de jure* guardian.

Held (1), that however much it may be desirable for a Court to appoint one or the other of the natural parents as the guardians when the adoptive parents are not available, it cannot be said that until appointment by Court the natural parents can be regarded as guardians *de jure*.

Case-law reviewed.

(2) That Art. 44 of the Limitation Act does not apply to the case.

Jagannada Doss for Appellant.

C. Sambasiva Rao for Respondents.

K.C.

Madhavan Nair, J.
28th January, 1931.

S.A. Nos. 1873 to 1875 of 1927.

Inam—Dharmilla—Right of Zamindar to eject.

The original grant was not produced and there was scanty evidence of the Raja's right to recover possession except an intimation in the village account book to the "Nayalu" and "Karnam" village officers that certain *lands* have been granted for sircar service *Tirasthu* (personal services) and that they should allow the grantees to enjoy the produce of the lands with the permission of the sircar.

Held, the use of the word "land" did not necessarily imply that kudiwaram was granted, whereas the direction to permit the tenants to take the produce showed that only melwaram was granted. In view of this finding the question how far (1914) M.W.N. 179 and 18 M.L.T. 142 which rest on 23 M. 320 is good law after 41 M. 1012 and 43 M. 166 and C.M.A. No. 398 of 1924 left open.

The Advocate-General and *V. Govindarajachari* for Appellant.

Y. Suryanarayana for Respondent.

S.V.V.

Jackson, J. C.R.P. No. 1023 of 1930.
21st January, 1931.

Criminal Procedure Code, S. 476—Complaint by Civil Court for perjury—No finding that it is "expedient in the interests of justice" that an inquiry should be made into the offence—Whether fatal to the prosecution.

The judgment-debtor filed a petition to enter partial satisfaction of the decree under O. 21, R. 2, Civil Procedure Code, filing a receipt evidencing a payment of Rs. 100. Decree-holder contended that he did not receive the money and did not give that receipt and sent a complaint to the Magistrate for perjury against the decree-holder.

Held, that the absence of a finding that it was in the interests of justice that a prosecution should be launched, was a mere irregularity which could be cured by S. 537, Criminal Procedure Code. If the complaint of the Munsif was bad, the order of the Sub-Court dismissing the appeal filed under S. 476, Criminal Procedure Code, might itself be treated as a proper complaint.

28 L.W. 774; (1928) M.W.N. 229 dissented from.

G. Sivaramakrishna Sastri for Petitioner.

A. Venkatasubba Rao and *A. V. Krishna Rao* for Respondent.

K.C.

The Chief Justice, Ramesam, Jackson, Anantakrishna Aiyar and Sundaram Chetty, JJ. Cr. M.P. No. 36 of 1931.
26th January, 1931.

Criminal Procedure Code (V of 1898), *S. 7* (1)*—Scope—Sessions Division consisting of part of a district—Notification of Government regarding same—Validity.*

The principle of S. 7 (1), Criminal Procedure Code, is that a Sessions Division should be equivalent to a whole district or a number of whole districts without having a fraction. Consequently the constitution of two Sessions Divisions each consisting of a full District, namely, East Tanjore District and West Tanjore District, does not offend any section and the Government Notification constituting such divisions is not *ultra vires.*

10 Bom. 374 referred to.

Per *Jackson, J., dissenting.*—The Government Notification did not create two districts in the place of the old unified district of Tanjore and each of the Sessions Divisions newly constituted therefore consisted of part of a district. The Notification establishing such new Sessions Divisions was consequently *ultra vires.*

30 Mad. 136 relied on.

N.R.C.

K. S. Jayarama Aiyar, S. Nagaraja Aiyar and *G. Gopalaswami* for Petitioner.

The Advocate-General (*A. Krishnaswami Aiyar*) for the Government.

The Public Prosecutor (*L. H. Bewes*) on behalf of the Crown.

B.V.V.

Curgenven and Cornish, JJ. A.S. No. 214 of 1929.
28th January, 1931.

Hindu Law—Widow—Mortgage by—Consideration, payment of a decree on a prior mortgage—Right to sue for a declaration in respect of the prior mortgage barred—Later mortgage, if can be questioned—Rights and duties of widow in respect of payments of husband's debts.

A widow mortgaged her husband's property in 1897 to raise money to pay off alleged debts due by her husband. In 1912 a suit was brought upon it for balance alleged to be due and was decreed. To pay off this decree amount the suit mortgage was alleged to be executed in 1914. The suit was filed by the reversioners in 1925 for a declaration that the mortgage of 1914 was not binding as against the reversion and it was contended that it stood in no better position than the prior mortgage and the decree thereon and that if it could be shown that the earlier mortgage and decree were attributable to the widow's improvidence in alienating property to pay debts which could and ought to have been discharged from the income in her hands, at least with regard to the interest, the reversioners would not be bound thereby.

Held, that to allow the plaintiffs now to open the question of the binding character of the previous alienation and the decree following upon it would, in effect, remove the bar which the Limitation Act has placed in their way. The plaintiffs would thereby be doing indirectly what they cannot do directly and cannot therefore be allowed to re-open it.

11 I.C. 392, 14 A.W.N. 137 and 58 M.L.J. 417 followed.

A widow is not bound to discharge her husband's debts out of the income of his estate; but she is bound to keep down the interest on her husband's debts and is only entitled to enjoy the net income from her husband's property. But an exception is recognised in favour of the alienee. If there was actual pressure at the time of the alienation and the widow had then no funds available for the discharge of the debt, or the alienee, after reasonable enquiry, *bona fide* believed that the alienation was necessary, he will be protected.

(1913) M.W.N. 275: 18 I.C. 275 and (1914) M.W.N. 488: 24 I.C. 534 referred to.

S. Varadachariar and *R. Rajagopala Aiyangar* for Appellants.

The Advocate-General, S. Jagadisa Aiyar, S. Nagaraja Aiyar and *N. Somasundaram* for Respondents.

S.V.V.

Reilly and Anantakrishna Aiyar, JJ.
28th January, 1931.

C.M.A. No. 266 of 1930.

Res judicata—*Co-defendants—Compromise decree in a representative suit—If* res judicata *against those not* eo nomine *parties but represented in the prior suit.*

One *L* brought a suit as kudiwaramdar of lands in a village claiming to be entitled to the produce of fish caught in the tanks in the village along with the other kudiwaramdars in the village, a few of whom were made parties as representing others also under O. 1, R. 8, Civil Procedure Code. One *R* claiming to be a pannaidar in the village brought himself on record as 15th defendant in the suit and contended that he was also entitled to a share in the fish and that the shares were determinable not on the basis of karai as *L* and some defendants claimed, nor on *per capita* basis as other defendants claimed, but in proportion to the extent of land held by each claimant. It was compromised and decreed to the effect that the division should be according to the extent and in determining the plaintiff's share, the extent of *R's* pannai land was also taken into account. *R* brought the present suit against the kudiwaramdars of the village claiming (1) his right to the fish, and (2) kudiwaram right in his pannai land. Some of the defendants herein were not *eo nomine* parties to the prior suit by *L*, though they should be deemed to be represented by the representative kudiwaramdars.

Held, that three conditions at least must be satisfied for a plea of *res judicata* between co-defendants.

(1) There must have been a real conflict of interests between the co-defendants in question,

(2) There must have been a determination of the rights of those defendants *inter se,* and

(3) That determination must have been necessary in order to give the plaintiff the relief which he got in that suit.

Per *Anantakrishna Aiyar, J.*—In some cases another test has also been applied, even when the above three are satisfied, namely, the appeal test. But, the question left open, as in this case that was satisfied.

The question whether *R* was holder of pannai land was necessary for the determination of plaintiff's share in the prior suit and to that extent it will be *res judicata,* but not the question whether he has or has not kudiwaram rights in those lands.

A decree in a compromise suit, if otherwise proper, is as much binding as a decree on contest even on those not *eo nomine* parties but who were represented by their representatives.

24 M.L.J. 192; 18 L.W. 177 followed.

The remarks in 10 Lah. 75 (P.C.) also seem to imply that it will operate as *res judicata.*

Observations of Sadasiva Aiyar, J., in 38 M. 851 not followed as *obiter.*

Jenkins v. *Robertson,* (1867) L.R. 1 H.L. Sc. and Div. 117, doubted even in England and not applicable in this country.

T. M. Ramaswami Aiyar for Appellant.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Respondents.

S.V.V.

Curgenven and Cornish, JJ. O.S.A. No. 90 of 1930.
29th January, 1931.

*Company—Articles of Association—Provision for election of Directors—Nature of taking of poll—*Ultra vires *act of Directors—Ratification by majority of shareholders—Individual right of shareholder regarding right to vote infringed—Power of Civil Court to interfere—Meaning of expression "casual vacancy".*

Where there is no adequate remedy open to the shareholder under the Articles of Association, the Court has jurisdiction to entertain a suit by the shareholders as against the Directors and the Company in respect of their individual rights as shareholders. The infringement of the shareholder's right to vote at a meeting held for the purpose of electing Directors is actionable. In such a case a majority of the general body of shareholders cannot by a resolution override the Articles which require Directors to be elected and resolve that certain persons having contrived to step into office without election shall continue there.

An assembly of shareholders for the purpose of recording their votes at a poll is not a general meeting. The legal conception of the meeting continuing is only for the purpose of taking the poll.

A casual vacancy in the directorate means any vacancy not arising by effluxion of time.

V. V. Srinivasa Aiyangar, K. Venkataramani, S. Parthasarathi and *V. K. Thiruvenkatachari* for Appellants.

T. R. Venkatarama Sastri, K. Narasimha Aiyangar and *N. Rajagopala Aiyangar* for 1st and 2nd Respondents.

~~*K. S. Rajagopala Aiyangar, V. C. Gopalaratnam, V. Sankaran,*~~ *U. Ramachandran* and *S. Panchapakesa Sastri* for other Respondents.

B.V.V.

Krishnan Pandalai, J.
3rd February, 1931.

C.R.P. No. 1416 of 1927.

Civil Procedure Code (V of 1908), *O.* 21, *Rr.* 89, 92 (2) *and* 93—*Execution sale—Application for rateable distribution by other creditors—Order for rateable distribution passed—Subsequent application under R.* 89 *by mortgagee of properties sold—Sale confirmed by executing Court but set aside in appeal—Other creditors whether entitled to notice—Purchaser's right to obtain restitution.*

In execution of a money decree certain immoveable properties of the judgment-debtors were attached and sold. But before the sale took place certain other decree-holders put in execution petitions and obtained orders for execution and for rateable distribution. The sale proceeds were distributed rateably among the several decree-holders. A person who had obtained a mortgage of the properties subsequent to the attachment but before the sale put in an application under O. 21, R. 89, Civil Procedure Code, for setting aside the sale after depositing the amount due under the decree in execution of which the property had been sold together with five per cent. of the purchase-money. The application was dismissed by the executing Court but the High Court on appeal set aside the sale. (*See* 52 M.L.J. 157.) It appeared that the creditors who had applied for rateable distribution were not made parties to the appeal to the High Court and that no notice had been issued to them. The purchaser having applied under O. 21, R. 93 for restitution and for return of the money which had been rateably distributed,

Held, that the persons who had applied for rateable distribution were not "persons affected" within the meaning of R. 92 (2) of O. 21 and were not entitled to notice thereunder. The order setting aside the sale could not consequently be impeached on the ground of want of notice.

Held, further, that assuming notice to the rateable creditors was necessary, the omission to issue the same was a mere irregularity and the Court could dispose of the case as though the original petition under O. 21, R. 89 was still pending. The purchaser was consequently entitled to get back the purchase-money with interest as also the five per cent. deposit from the persons who had received the several amounts.

35 M.L.J. 604 distinguished.

B. Sitarama Rao and *P. Kameswara Rao* for Petitioner.

G. Lakshmanna, P. Somasundaram, T. Ramachandra Rao and *C. Rama Rao* for Respondents.

B.V.V.

Jackson, J. C.M.S.A. No. 129 of 1926.
3rd February, 1931.

Appeal—Claim order falling under S. 47 but in execution of a decree of Small Cause Court—Whether second appeal lies.

A decree was passed by a Court in a suit of the nature cognizable by a Small Cause Court. In execution of that decree, certain properties were attached. A claim was preferred against it and as the order on it was one falling under S. 47, an appeal was filed. As against the Appellate Court's order a second appeal was filed to the High Court,

Held, no second appeal lay, the test being what is the nature of the suit in which the decree was passed and not the nature of the proceedings in execution.

30 Bom. L.R. 1447 followed.

P. Satyanarayana Rao for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Jackson, J. Cr. R C. No. 337 of 1930.
27th January, 1931.

Defamation—Publication to a co-conspirator—If amounts to publication.

It was complained that the petitioners conspired with one *A*, the President of a Union Board and maliciously got up a petition to the effect that the complainant—a candidate for election to the Board—was suffering from leprosy.

Held, that the President was accused of being one of the conspirators and therefore publication to the President—a co-conspirator—was no publication. "If *A* and *B* conspire to draw up a document defaming *Z* and leave it with *B*, there is no publication."

V. L. Ethiraj, T. R. Ramachandra Aiyar, A. S. Mannadi Nair, K R. Venkatrama Sarma and *S. R. Dikshit* for Petitioners.

The Public Prosecutor for the Crown.

L. A. Govindaraghava Aiyar and *S. A. Seshadri Aiyangar* for Complainant-Respondent.

S.V.V.

Curgenven and Cornish, JJ. A.S. No. 286 of 1928.
5th February, 1931.

Will—Construction—Charges in favour of charities and maintenance—Surplus more than half to the legatee—Whether trust created—Blending of joint property—Proof.

A testator bequeathed certain properties in favour of *P* and provided that *P* shall enjoy the immoveable property and from its income shall expend annually certain quantities of paddy and of cash towards the upkeep of specified ceremonies and charities and pay certain maintenance to his widow. *P* died leaving two sons, who were members of a joint Hindu family. The income from these properties were kept together with the income from coparcenary properties.

Held, that even if the will gave only a life-interest to *P*, the sons took it as tenants-in-common. There was no trust created but *P* took it subject to the charges in favour of the charities and the maintenance holder. To rebut the construction of a trust, it is sufficient if it contains a bequest of surplus property for the use and benefit of private persons, especially where the charges swallow only about half the income.

8 M.I.A. 66 and 5 Cal. 438 referred to.

40 M. 116 distinguished as a case of a wakf.

The onus of establishing a clear intention to blend is on the party who asserts it. Where property exclusively owned by one member is blended the intention becomes clear enough. But when it is joint property, even if the income from all their property was kept together, such a course is hardly incompatible with

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the matter of the ownership and clearer proof of intention to blend is therefore necessary.

K. Narasimha Aiyangar for Appellant.

T. L. Venkatarama Aiyar for Respondent.

S.V.V.

Krishnan Pandalai, J. S.A. No. 2362 of 1927.
10th February, 1931.

Res judicata—*Suit by jewel custodians of a temple against trustees—Claim for a higher-rate of rice measures—Previous suits between trustees and jewel custodians in which all the present plaintiffs except one were not parties—Question substantially and distinctly decided.*

The trustees of a temple were sued by the respondents who were jewel custodian mirasidars for their emoluments. The emoluments were mentioned as 3 measures of rice by the old standard, but which amounted to 3¾ new measures owing to the reduction by Government in the capacity of measures. Hence they claimed more. In two previous suits against the trustees by the jewel custodians as plaintiffs in which all the present respondents were not parties except the 1st respondent, who was only impleaded as one of the defendants in those suits, the point in issue now, had necessarily to be decided in order to find out the quantity of rice to be decreed and their decision was, that the then plaintiffs (jewel custodians) were entitled only to 3 current measures. On the question whether these judgments operated as *res judicata,*

Held, that the decision as to respondents being entitled only to rice on the footing of 3 new measures per day, was *res judicata* by the judgments in the previous suits.

Where persons are litigating in respect of a common right in which they are all interested, some of whom are arrayed as plaintiffs and the rest as co-defendants along with the opposite party who is opposing the common claim, in such a case, although disputes may exist *inter se* between the plaintiffs and co-defendants either as to the quality or quantity of their respective interests in the common right, such disputes do not concern the main question in litigation between them on the one hand and their common opponent on the other, and the result of a *bona fide* suit of such a character is binding, as to what was directly and substantially decided, on all the persons interested in the common right.

Whether they were plaintiffs or co-defendants, the question of the measure according to which the rice was payable was distinctly raised and decided in favour of the trustees.

K. Balasubrahmania Aiyar for Appellants.

K. S. Krishnaswami Aiyangar and *N. Srinivasa Aiyangar* for Respondents.

K.C.

Krishnan Pandalai, J. S.A. Nos. 1104 and 1313 of 1929.
10th February, 1931.

Madras Local Boards Act (XIV of 1920), *S. 79 (2)—Inam lands—Mode of assessing value for levying land-cess.*

Under the Madras Local Boards Act, 1920, when once the District Board has issued a notification regarding the levy of land-cess the Collector is entitled to levy the cess on inam lands taking their value on the basis of the revenue which they would have paid if they were not inam at the time of the notification. In such a case the actual rental realised by the inamdar from his tenants cannot be taken as the basis for fixing the value of the inam lands.

Provisions in Madras Local Boards Act relating to the levy of land-cess considered.

P. S. Narayanaswami Aiyar and *K. V. Srinivasa Aiyar* for Appellants.

The Government Pleader (P. Venkataramana Rao) for Respondent.

B.V.V.

Krishnan Pandalai, J. S.A. No. 2340 of 1927.
11th February, 1931.

Hindu Law—Suit against one member of a joint Hindu family—Attachment before judgment during the lifetime of the defendant—Death of the defendant before decree—Operation of survivorship.

Where the share of a Hindu coparcener in undivided family property was attached before judgment in a suit brought against him in his individual capacity, but the decree was passed only after his death,

Held, that the attachment would not prevent the accrual of title by survivorship to the other coparceners, unless the decree was also passed during that coparcener's lifetime.

17 M. 144 followed.

26 M.L.J. 517 and 26 M. 604 distinguished as cases where the decree also was passed during the coparcener's lifetime.

S. Varadachariar and *C. S. Swaminathan* for Appellant.

T. R. Venkatarama Sastriar and *M. Murugappa Chettiar* for Respondent.

S.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. No. 433 of 1926.
12th February, 1931.

Civil Procedure Code (V of 1908), *S. 144—Costs paid under decree of Trial Court—Decree reversed in appeal—Order for restitution—Interest on costs whether can be awarded.*

N.R.C.

Where costs were paid to the respondent in an appeal as per decree of the first Court, which decree was reversed in appeal and thereupon the appellant applied for restitution of the amount of costs paid,

Held, that under S. 144, Civil Procedure Code, the Court could, in passing an order for restitution, direct the respondent to pay interest on the amount of costs which he had realised under the decree of the Trial Court. Interest was awarded at 6 per cent. per annum.

63 I.C. 513 followed.

3 Cal. 162 distinguished as a case before the enactment of S. 144.

P. N. Appuswami Aiyar for Appellant.

T. Krishnaswami Aiyangar and *S. K. Narasimhachari* for Respondent.

S.V.V.

Jackson, J. Cr. R. P. No. 555 of 1930.
13*th February,* 1931.

Criminal Procedure Code, Ss. 342 *and* 537—*Non-compliance with S.* 342 *if an illegality vitiating the trial or a mere irregularity which can be cured by S.* 537.

Where after the defence closed its case in a criminal trial, fresh evidence for the prosecution was recorded and there was no fresh examination of the accused under S. 342 of the Code,

Held, that the non-compliance with S. 342 was not an illegality, that in each case of non-compliance with mandatory provisions of the Code it should be proved as a fact that the non-compliance occasioned a failure of justice or caused prejudice to the accused before the conviction could be set aside on the ground of illegality of the trial.

53 M. 937 applied and followed.

1930 M.W.N. 914 and 46 M. 449 (F.B.) pointed out to be no longer good law.

Kasturi Seshagiri Rao for Petitioners.

The Public Prosecutor (*L. H. Bewes*) for the Crown.

K.C.

Krishnan Pandalai, J. S.A. No. 1051 of 1921.
18*th February,* 1931.

Civil Procedure Code (*V of* 1908), *S.* 47—*Portion of the plaint in a suit falling under S.* 47—*Court, if can convert that part into an execution petition under S.* 47.

A suit was filed for certain reliefs with regard to two items of property. As regards one of them, the proper course was to apply in execution and ask the Court to carry out its own order. In an application to convert the plaint into an execution proceed

ing, it was contended that a proceeding can be treated either as a petition or as a suit and not as both and that as such there can be no partial conversion under S. 47 (2).

Held, that permission can be given to convert a portion of the plaint. There is no doubt an observation *contra* in 1 L.W. 443 at 445, but on the facts it was not the ground of decision nor necessary for it.

C. Rangaswami for Appellant.

N. Swaminatha Aiyar for Respondent.

S.V.V.

Reilly and Ananta-krishna Aiyar, JJ. C.M.A. No. 459 of 1930.
18th February, 1931.

Guardians and Wards Act (1890), *S.* 9—*Appointment of guardian of minor—Person living outside British India—Whether can be appointed.*

It is clearly against the intention of the Guardians and Wards Act that anybody outside British India should be appointed guardian of a minor boy living in British India.

22 M.L.J. 68 followed.

K. Rajah Aiyar and *S. Narasinga Rao* for Appellant.

S. Varadachariar and *S. V. Venugopalachari* for Respondent.

B.V.V.

Wallace and Stone, JJ. Appeal No. 412 of 1929.
24th February, 1931.

Hindu Law—Widow—Possession of a portion of joint family property—Dissipation by her on third parties—Claim of maintenance—Whether allowable.

Where a widow has had or ought to have still in her hands a sufficient portion of joint family property to give her the rate of maintenance claimed by her and even if she has dissipated it, that does not afford her a legal claim on the balance of the joint family property in the hands of the defendants who are her own son and grandson.

As the amount which ought to be with her available for her maintenance has, on her own showing, been mostly dissipated on third parties and is not now with her and therefore cannot be made in the suit the subject of a charge, she cannot claim maintenance.

33 Bom. 50 and 26 I.C. 430 referred to.

T. M. Krishnaswami Aiyar, R. Visvanatha Aiyar and *S. Thyagaraja Aiyar* for Appellants.

V. V. Srinivasa Aiyangar and *K. Venkataramani* for Respondent.

K.C.

Jackson, J. C.R.P. No. 1691 of 1930.
26th February, 1931.

Civil Procedure Code (V of 1908), O. 21, R. 63—Suit under —Declaration in favour of one decree-holder—Whether enures for benefit of another decree-holder—Non-compliance with rule of law —Interference by High Court in revision.

A suit under O. 21, R. 63, Civil Procedure Code, is not a representative suit. Consequently, a declaration obtained by one decree-holder that certain properties can be attached in execution cannot enure for the benefit of another decree-holder who has allowed an adverse order in claim proceedings in respect of the same properties to become final by his failure to institute a suit.

42 Mad. 143 relied on.

12 W.R. 221 distinguished.

Where a clear provision of law has been violated the High Court can interfere in revision and the aggrieved party need not be driven to a fresh suit.

N. S. Srinivasa Aiyar for Petitioner.

G. Ramakrishna Aiyar and *C. Srinivasachari* for Respondents.

B.V.V.

Madhavan Nair, J. Application Nos. 860 of 1930 and 244 of 1931
3rd March, 1931. in C.S. No. 229 of 1924.

Mortgage—Suit on mortgage by deposit of title-deeds—Appointment of receiver—Collections made by receiver—Whether enure for benefit of mortgagee—Supervening insolvency of mortgagor—Effect.

During the pendency of a suit to enforce a mortgage by deposit of title-deeds, the Court appointed a receiver of the mortgaged properties at the instance of the plaintiff with a direction that the net income should be paid into Court to the credit of the suit. Subsequently, the suit was decreed, but the sale proceeds of the properties were found insufficient to satisfy the decree-debt. The mortgagor having been adjudged insolvent during the pendency of the suit, the decree-holder sought his remedy against the collections made by the receiver.

Held, that the mortgagee decree-holder was entitled to so much of the collections in the receiver's hands as will make up the deficiency, and that the supervening insolvency of the mortgagor did not affect the right of the mortgagee in that respect.

High on Receivers, S. 643, 14 C.L.J. 526 and 47 Cal. 418 relied on.

The Advocate-General (A. Krishnaswami Aiyar), M. Subbaroya Aiyar and *T. V. Viswanatha Aiyar* for Petitioner.

S. Duraiswami Aiyar and *V. Balaraman* for 3rd Respondent.

C. Krishnaswami Aiyar for the Official Assignee.

B.V.V.

Sundaram Chetty, J. C.R.P. No. 1633 of 1929.
17th February, 1931.

Civil Procedure Code (V of 1908), *O.* 1, *R.* 8—*Limitation Act (IX of* 1908), *Art.* 181—*Death of sole plaintiff on record—Suit, if abates—Right of other members of the community to continue —Period within which to apply—Dismissal before such application, if a nullity.*

Where a representative suit was filed on behalf of a community by a particular individual thereof, who died, but no other member of the community applied to continue the suit, whereupon the Court having waited for over six months since the death of the sole plaintiff, dismissed the suit on the ground that it cannot wait any longer, but subsequent to the dismissal, on the application of certain other members of the community, added them as parties to the suit and directed the suit to be continued,

Held, (*i*) that a representative suit does not abate on the death of the plaintiff on record,

(*ii*) that on such death the other members of the community had 3 years to apply to continue the suit under Art. 181 of the Indian Limitation Act, 41 I.C. 268 followed and 11 M.L.T. 257 referred to, and

(*iii*) that the dismissal of the suit without waiting for 3 years was a nullity and not a valid dismissal for default and did not require to be set aside and the suit may therefore be continued. 53 Cal. 844 referred to.

Watrap S. Subramania Aiyar and *T. P. Gopalakrishnan* for Petitioners.

A. V. Narayanaswami Aiyar for Respondents.

K.C.

Krishnan Pandalai, J. S. A. No. 2005 of 1931.
17th February, 1931.

Mortgage—"Salusari" *interest—Meaning—Instalment bond*—Post diem *interest—Right of creditor to appropriate payments.*

The word *"salusari"* interest in a mortgage bond means simple interest and not compound interest with annual rests.

In the case of an instalment bond where no *post diem* interest is specifically provided for the Court may presume simple interest at the contract rate. 7 Pat. 305 (P.C.) relied on.

Where the payments endorsed on the bond do not specify appropriation towards principal it is open to the creditor to appropriate the payments to his best advantage, namely, towards interest first and then towards principal.

B. T. M. Raghavachari for Appellants.

P. Somasundaram for Respondents.

B.V.V.

N.R.C.

Jackson, J. Cr. R.C. Nos. 730, 754 and 773 of 1930.
17th February, 1931.

Madras Salt Act (1889), *S. 74 (f)—Procedure in salt cases—Police charge-sheet—Legality.*

The Madras Salt and Abkari Acts do not purport to lay down a self-contained procedure for dealing with the offences therein specified so as to exclude the ordinary procedure laid down in the Criminal Procedure Code. A charge-sheet by the Police for an offence under the Act is therefore quite legal.

44 M.L.J. 231 and 48 M.L.J. 605 referred to.

K. S. Jayarama Aiyar, V. L. Ethiraj, G. Lakshmanna and *B. T. M. Raghavachari* for Petitioners.

The Advocate-General (*A. Krishnaswami Aiyar*) and *The Public Prosecutor* for the Crown.

B.V.V.

Sundaram Chetty, J. C. R. P. No. 831 of 1930.
25th February, 1931.

Court Fees Act—Suit for redemption—Usufructuary mortgage—Claim for account of surplus profits—Court-fee if payable on principal or on estimated profits also—Value for jurisdiction purposes.

The mortgagor of an usufructuary mortgage filed a suit to recover possession of the immoveable property mortgaged with an account of the surplus profits collected by the mortgagee. The principal amount was Rs. 1,500 and the profits were estimated at Rs. 5,654. Court-fee was paid only on the principal under S. 7, cl. (9), Court Fees Act, but the suit was filed in the Sub-Court.

Held, that a suit for redemption is a suit not only for recovery of possession of property but also of surplus profits due to the mortgagor (I. L. R. 12 A. 471 and I. L. R. 45 A. 154). The suit is really to recover possession and the right to recover profits is incidental to that right and not distinct and as such, Court-fee is payable only on the principal amount. In a usufructuary mortgage especially, not only the corpus but also future profits should be taken to have been secured in favour of the mortgagee. In that sense the property mortgaged will be the corpus and the profits.

12 M.L.T. 493 discussed and doubted.

A suit for redemption is not a suit covered by S. 8 of the Suits Valuation Act nor is it one of those suits in respect of which the Local Government can make rules for determining the jurisdiction value under S. 3. But the question is covered by authority so far as this Court is concerned that the value for Court-fees and juris-

diction shall be the same and the suit should therefore have been filed in the Munsif's Court.

5 Mad. 284 (F.B.) and 39 Mad. 447 followed.

Y. Suryanarayana for Petitioner.

P. Somasundaram for Respondent.

S.V.V.

Curgenven and Cornish, JJ. A. S. No. 210 of 1930.
4th March, 1931.

Madras Hindu Religious Endowments Act (1925), *S.* 73 (2) *—Scope—Suit for declaration of plaintiff's rights as hereditary trustee—Sanction of Board if necessary—Meaning of words "except as provided for in the Act" in S.* 73 (2).

A suit for a declaration that the plaintiff is the hereditary trustee of a temple and that the appointment of another person in his place by the temple committee was illegal is not one relating to administration and management of the temple within the meaning of S. 73 (2) of the Madras Hindu Religious Endowments Act and is therefore maintainable even without the sanction of the Religious Endowments Board. Scope of S. 73 (2) discussed.

45 Mad. 113 and 97 I.C. 480 relied on.

The effect of the words "except as provided for in this Act" in S. 73 (2) is that no suit can be maintained contrary to the provisions of the Act and not that a suit is not maintainable unless provided for in the Act.

C. S. Venkatachari, V. N. Venkatavaradachari and *R. Gopalachari* for Appellant.

E. S. Chidambaram Pillai and *C. Rangaswami Aiyangar* for 1st Respondent.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for 2nd Respondent.

B.V.V.

ORIGINAL SIDE.

Madhavan Nair, J. O.P. No. 267 of 1928.
6th March, 1931. Appn. No. 1890 of 1930.

Indian Companies Act, Ss. 169, 171, 229*—Presidency Towns Insolvency Act, S.* 53*—Decree-holder of the Company —Attachment of articles in execution—Court sale fixed—Petition to wind-up Company by a creditor—Stay of sale and appointment of Official Liquidator—Sale of articles by him and proceeds realised—Decree-holder's claim—Whether entitled to priority—Discretion of Court whether fettered in passing such orders.*

In a suit against a Company for rent, past and future mesne profits, a decree was passed in favour of the plaintiffs (the applicants herein) who in execution thereof attached machinery and other articles of the Company and had them removed to Court. When the articles were ordered to be sold by the Court and the actual date of sale was fixed, a few days previous to it, a creditor of the Company filed a petition for winding up the Company and for stay of sale of properties. The Judge sitting in Chambers appointed an Official Liquidator, and gave him custody of the articles of the Company and said "I decide nothing as to the rights of attaching creditors to priority". The Liquidator sold the goods and realised the proceeds. The petitioners in this application as decree-holders claimed that the nett sale proceeds in the hands of the Official Liquidator were subject to the said attachment and that they had priority over other creditors in the liquidation proceedings with respect to their decree amount. On the question whether S. 229 of the Indian Companies Act, read with S. 53 of the Presidency Towns Insolvency Act would fetter the discretion of the Court in passing orders under S. 169 of the Act, in favour of attaching creditors if it thinks such orders are justified by the circumstances of the case,

Held, that S. 229 is not to be construed in such a way as to fetter the discretion allowed to the Court under Ss. 169 and 171 of the Indian Companies Act. 16 Ch. D. 337 referred to and 31 Bom. L.R. 1209 applied.

The power under the section 229 has to be judiciously exercised having regard to the circumstances of the case. (S. 229 of the Indian Act corresponds to S. 201 of English Act.) 43 E.R. 839 referred to.

The interest of general creditors need not be preferred to those of particular creditors.

That, as no unfair proceedings of any kind could be ascribed to the applicants, they should be given the relief they asked for and the Official Liquidator should pay them the balance of sale proceeds in his hands towards the decree amount.

G. Ramakrishna Aiyar for Applicants.

S. Venugopalachari for Official Liquidator.

K.C.

Curgenven and Cornish, JJ. A.S. No. 108 of 1929.
5th March, 1931.

Undue influence—Creditor purchasing property—Vendor in need of money, if enough to affect the transaction with undue influence.

A Hindu father executed a sale for paying off Rs. 10,000 due on a first mortgage and Rs. 5,000 due on a second mortgage over the properties. The second mortgagee had obtained a decree on his mortgage and also instituted criminal proceedings against the mortgagor for having stated that there were no prior encumbrances on the property. It was contended that the sale was vitiated by undue influence in that the vendee took advantage of his own debt and other indebtedness and worked upon the father's fear that he would be convicted if he did not discharge the second mortgage and thereby secured the property at an unduly low figure.

Held, that it is the relationship between the parties and not the unconscionableness of the bargain that has first to be considered. Mere fact that the vendor was in urgent need of money is no sufficient ground for an affirmative finding on this point; nor can it be said that merely because the purchaser happens to be the creditor, he is in such a position as to dominate on the seller.

3 P. 279; 34 Cal. 150; 26 L.W. 147 and 43 Mad. 546 referred to.

Where hundreds of acres are sold in one block, it is not proper in considering the adequacy of the sale price to calculate by taking the value of the lands in small blocks and totalling them up.

16 L.W. 478 relied on.

The plaint contained another allegation that at the time when the sale-deed was executed the parties to it entered into an oral agreement whereby the vendee was to sell such portion of the property as was required to pay the debts and to restore the balance to his vendor. *Held* this is quite incompatible with the case of undue influence.

P. Somasundaram for Appellant.

G. Lakshmanna, P. V. Vallabhacharlu and *G. Chandrasekhara Sastri* for Respondent.

S.V.V.

Wallace and Stone, JJ. A.S. Nos. 333 and 365 of 1929
5th March, 1931. and 77 of 1930.

Land acquisition—"Market value," meaning of—Value of pathways, ponds, etc., how to be calculated.

Where lands acquired under the Land Acquisition Act consisted of three categories of lands, namely, (1) Strips of land forming pathways, (2) Bits of land forming the beds of ponds,

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and (3) Lands in which the claimant was entitled to melwaram right, and it was claimed that in respect of all these categories, the Court should first ascertain the market value of the whole block of land including the pathways and the pond as fit for building sites and then make a deduction respectively for (1) the restriction by reason of the easement of way, (2) the expenses of filling up the pond, and (3) the value of the kudivaram right of the occupancy tenants,

Held, that though this might be the correct procedure according to the decisions in 42 Mad. 644, 51 All. 765 and (1914) A.C. 576, such a course was not permissible in the present case as there were no materials to evaluate the compensation on this basis because before the Land Acquisition Officer the claim had been made for three separate categories separately and both before him and the Lower Court, the valuation had proceeded on such separate basis.

In the circumstances it was impossible to hold that the strips of land forming the pathways had any market value as building sites or even as agricultural lands.

25 Cal. 194 at 202 (P.C.) and 46 Mad. 789 relied on.

The compensation is to be paid with reference to the value of the land to the owner as on the date of the notification, including compensation for prospective advantages and subject to deductions for restrictions on the property. The value to the taker is not the test nor can the Court take into consideration the circumstances that may be brought about as a result of the acquisition.

L.R. 6 Q B. 42 and (1914) A.C. 576 referred to.

The Government Pleader for Appellant.

S. Varadachariar, C. Narasimhachari and *M. E. Rajagopalachari* for Respondent.

S.V.V.

The Chief Justice, Ramesam, Reilly, L.P.A. No. 70 of 1926.
Anantakrishna Aiyar and Sundaram Chetty, JJ.
11*th March,* 1931.

Civil Procedure Code (*V of* 1908), *O.* 20, *R.* 12—*Mesne profits —Decree silent regarding interest—Power of executing Court to award interest on mesne profits.*

Where a decree of Court which awards mesne profits under R. 12 of O. 20, Civil Procedure Code, is silent as to interest it is not open to the executing Court to fix the rate of interest and to execute the decree after allowing interest.

53 M.L.J. 619 dissented from; 27 C. 951 (P.C.) explained.

6 C.L.J. 462 and 30 C.L.J. 205 referred to.

Per *Reilly, J.*—It is the duty of the Court passing a decree to make its intention in the matter of interest so clear that there is

no room for interpretation. Where the intention is not clearly expressed it is the duty of the executing Court to ascertain that intention by interpretation. Even if the decree is "silent as to interest" in the sense that the word "interest" does not appear in it nevertheless if by the use of the expression "mesne profits" combined with a reference to the rate of interest, etc., the decree indicates that interest is awarded the executing Court should give it at six per cent. per annum, there being no rate mentioned. This result however must be arrived by construing the decree and not by use of any discretion vested in the executing Court. There may be other cases in which the "silence" in the decree may itself amount to a refusal to grant interest.

K. P. Raman Menon for Appellant.

K. P. Krishna Menon for Respondent.

B.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. No. 105 of 1927.
11th March, 1931.

Provincial Insolvency Act (V of 1920), *Ss.* 48 (2) *and 67—Payment of creditors in full—Ultimate surplus—Rate of interest from date of adjudication down to date of payment—Right of creditor to claim contract rate.*

Where after the proved debts have been paid in full there is an ultimate surplus of the insolvent's assets, the creditor is entitled to claim interest at the contract rate from the date of adjudication till the date of payment, provided the rate is above six per cent. and the Court has not disallowed the same on other grounds. The proviso in S. 48 (2) of the Provincial Insolvency Act should be read along with the words "after payment in full of his creditors" in S. 67 of the Act so as to mean that the creditor's right to the contract rate of interest is preserved unless it has been disallowed.

24 A.L.J. 441 not followed.

48 A. 272 referred to.

G. Chandrasekhara Sastri for *G. Lakshmanna* for Appellant.

V. Viyyanna for Respondent.

B.V.V.

Jackson, J. C.M.S.A. No. 126 of 1930.
13th March, 1931.

Decree—Execution—Party against whom decree was passed, a lunatic—Application to set aside the decree as nullity—Executing Court, whether can go behind the decree—Practice.

In a suit by the plaintiff against the defendant a decree was passed in favour of the plaintiff and the properties belonging to the defendant were brought to sale in execution. The defendant's wife filed a petition in the executing Court that the execution was

not proper inasmuch as the Court had not jurisdiction as the defendant was a lunatic and remained unrepresented in the suit and that the decree was got *ex parte*. The Lower Appellate Court ordered further inquiry into the matter.

Held, that the executing Court cannot go behind the decree.

The question being really one of forum, it is not as though the aggrieved party had his remedy only in the Court of execution. In such matters of procedure it is highly advisable that the Court should follow an uniform practice.

44 Cal. 627 followed.

53 Cal. 166 at 173 and 4 Pat. L.J. 240 considered and explained.

38 Mad. 682 and A.I.R. 1926 Mad. 429 referred to.

The word "apparently" occurring in "where the decree presented for execution was made by a Court which apparently had not jurisdiction" on page 173 of 53 Cal. is only a third way of expressing the principle by the same metaphor, being synonymous with "on its face" and "without going behind".

R. Sundaralingam for Appellant.

M. Patanjali Sastri for Respondent.

K.C.

Reilly and Anantakrishna Aiyar, JJ. C.R.P. No. 1292 of 1928.
13th March, 1931.

Civil Procedure Code (V of 1908), *O.* 21, *R.* 89—*Third party purchaser—Deposit to set aside execution sale—Claim suit decreed in favour of person making deposit—Suit to recover amount paid into Court under protest—Contract Act,* 1872, *S.* 72.

Where subsequent to a private sale the property conveyed was attached and sold in execution of a decree obtained against the vendor and the third party purchaser paid into Court under protest the sale price and the deposit as required by O. 21, R. 89, Civil Procedure Code, and the claim suit of the purchaser having been ultimately decreed in his favour he sued the judgment-debtor for restoration of the amount he had paid into Court,

Held, without deciding whether the third party purchaser was a person interested within the meaning of O. 21, R. 89, that he was entitled to recover the sale price and the five per cent. deposit under S. 72 of the Contract Act.

12 M.I.A. 65, 7 C. 648, 15 C.L.J. 83, 40 Cal. 598 and 44 M.L.J. 325 referred to.

G. Chandrasekhara Sastri for *G. Lakshmanna* for Petitioner.

V. Viyyanna for Respondent.

B.V.V.

The Chief Justice, Ramesam, Reilly, Anantakrishna Aiyar and Sundaram Chetty, JJ. C.M.A. No. 274 of 1929.
9th March, 1931.

Civil Procedure Code—Ex parte *order in execution—Order falling under S.* 47—*O.* 9, *R.* 13, *if applies.*

O. 9, R. 13, Civil Procedure Code does not apply to orders in execution proceedings, even though such orders also fall within S. 47 of the Code and are deemed to be decrees by virtue of the definition of "decree" in S. 2. The words "summons," "defendant" and "suit" in R. 13 of O. 9 are all inappropriate to execution proceedings. The expression "treat" in S. 47 and "deemed" in S. 2 further indicate that the Code treats execution proceedings as different from suits.

37 Mad. 462 overruled.

50 M.L.J. 200 approved.

Observations in 52 Mad. 899 at 909 distinguished as *obiter.*

T. M. Krishnaswami Aiyar and *S. Subramania Aiyar* for Appellant.

N. Srinivasa Aiyangar for Respondent.

S.V.V.

Madhavan Nair, J. S.A. No. 2336 of 1927.
13*th March,* 1931.

Contract—Void contract—Suit to recover advance paid under —Restoration of benefit—Quantum meruit—*Contract Act,* 1872, *S.* 65.

Where a contract for the supply of labour was held to be invalid because of non-compliance with the rules framed under the Madras Planters Labour Act, 1903 and thereupon one of the parties to the contract sued to recover the advance paid under the invalid contract,

Held, that though the contract was void the suit claim was not for enforcement of the invalid contract but only for the restoration of the benefits passed thereunder, and the plaintiff was entitled to recover the advance both on the principle of the *quantum meruit* and under S. 65 of the Contract Act.

43 C. 827, 54 C. 189 and 53 M. 352 referred to.

8 A.C. 517 explained.

C. S. Venkatachariar and *C. S. Swaminathan* for Appellant.

B. Sitarama Rao for Respondent.

B.V.V.

Ramesam, J. S.A. No. 1957 of 1927.
16*th March,* 1931.

Evidence Act, S. 32—*Recital in a gift of a prior gift, if admissible*—De facto trustee *in management—Suit to recover trust property—Maintainability of.*

N.R.C.

In 1880 a widow executed a deed of gift in favour of her step-daughter *N* wherein she recited that her husband had made a gift of the properties to *N* at the time of her marriage and that she was executing a formal document in respect of the same pursuant to his directions.

Held, that *N* derived her title from the father and not from the widow and that the recital in the gift deed as to the prior gift by the father was admissible under S. 32, cl. (2) of the Evidence Act even as against the reversioner. Cases like I.L.R. 36 All. 187 dealing with the admissibility of recitals relating to necessity in widow's alienations distinguished.

N had dedicated her property to a trust by a deed wherein she appointed herself trustee for life and directed that her step-son *K* and his descendants should administer the trust after her lifetime. *K* died during *N's* lifetime and it was found that the plaintiff who will be the next reversioner to *N* had been appointed and was in fact managing the trust even during *N's* lifetime. In a suit by plaintiff to recover the trust properties from a person who denied the trust,

Held, (1) that it is doubtful if the widows of *K* could claim to be trustees on the ground that reference to *K's* descendants implied "heirs" generally as words of limitation,

(2) that as *K* had not accepted the appointment during his lifetime, he took no vested interest so as to preclude *N* from making any other appointment, and

(3) that in any event, as *K's* widows had taken no active steps to protect the trust but on the other hand seemed to support the adverse claim of the defendants, they could not be deemed to have accepted the trust and that the plaintiff was entitled to maintain this suit either on the footing of his appointment or as *de facto* trustee or at any rate as reversionary heir to *N*. Cases of *de facto* trustee's right to maintain actions to recover trust property referred to.

The Advocate-General (*A. Krishnaswami Aiyar*) and *R. Ramamurthi* for Appellant.

S. Varadachariar and *A. V. Visvanatha Sastri* for Respondent.

S.V.V.

Wallace and Stone, JJ. A.S. No. 167 of 1925.
18*th March*, 1931.

Procedure—Sale in execution of a decree—Variation of the decree to a small extent—Sale if void—Petition for restitution under S. 144 dismissed—Right of suit.

A decree was passed by the first Court for Rs. 7,695 and a sale was held in execution of that decree. On appeal the decree

was varied by the interest being reduced from 9 per cent. to 6 per cent. with the result that the decree amount finally was reduced to Rs. 7,495. A petition to set aside the sale in restitution under S. 144 was dismissed on the ground that the variation in the decree did not prejudice the judgment-debtor as the variation was only slight. The debtor thereupon filed a suit to set aside the sale.

Held, that whatever may be the case where the sale is void *ab initio*, he has no other right of action in cases such as this where the sale is not *ab initio* void.

Appellant in person.

The Advocate-General (A. Krishnaswami Aiyar), K. Umamaheswariah, Ch. Raghava Rao and *M. Venkatasubbiah* for Respondents.

S.V.V.

Curgenven and Cornish, JJ. A.S. Nos. 259 and 260 of 1929.
18th March, 1931.

Malabar Law—Karnavan's alienation—Suit by anandravan when subsequent Karnavan not disabled to sue—If and when maintainable.

An alienation by the prior Karnavan was sought to be set aside by the anandravans on the ground that the present Karnavan was inextricably mixed up with the transaction and could not sue to set it aside.

Held, that unless the Karnavan is disabled from suing to recover possession of the tarwad property, an anandravan cannot be allowed to sue on behalf of the tarwad.

32 M.L.J. 328; (1917) M.W.N. 342 and 43 M. 393 relied on.

The contention that the present Karnavan's laches and neglect to bring a suit justify the suit by the anandravan may be supported if it was shown to be a case of a Karnavan wilfully refusing to take the necessary proceedings to recover property in direct antagonism to the interests and wishes of the members of his tavazhi.

T. R. Venkatarama Sastri and *P. S. Narayanaswami Aiyar* for Appellant.

K. P. M. Menon, D. A. Krishna Variar and *P. S. Ramachandra Aiyar* for Respondents.

S.V.V.

Wallace and Stone, JJ. A.S. No. 438 of 1929.
18th March, 1931.

Documents—Non-production of, on the ground that there was nothing relevant in them—If justified.

It is not open to a party to refuse to produce accounts on the ground that they will not help the case. His duty is to produce them and leave it to the Court to say that they do not support the case. Otherwise an adverse inference may be drawn from their non-production.

M. Patanjali Sastri, V. Ramaswami Aiyar and *T. K. Subramaniam* for Appellants.

T. L. Venkatarama Aiyar for Respondent.

S.V.V.

Wallace and Stone, JJ. A.S. No. 123 of 1927.
18th March, 1931.

Evidence—Expert—Paid for by the defendant—If expert's evidence can be dismissed on that simple ground.

It is an unfounded insinuation to make that an expert is giving evidence for the defendant because he was paid a fee by the defendant. In other words, it means that his evidence is not his genuine opinion, but merely what the defendant has paid him to say. If expert evidence is to be thus so easily put on one side, Courts can better refuse once for all to examine them. If the manner in which the case stated to him was non-committal, it would be extremely convincing. But if in the way the case was stated to him, the opinion that the defendant wished to get from him was indicated, then it may lose some of its independant character.

C. S. Venkatachariar for *T. Rangachariar* and *V. N. Venkatavaradachariar* instructed by *Messrs. Short, Bewes & Co.* for Appellant.

The Advocate-General (A. Krishnaswami Aiyar), A. C. Sampath Aiyangar and *T. R. Srinivasa Aiyar* for Respondent.

S.V.V.

Venkatasubba Rao, J. S.A. No. 272 of 1928.
26th March, 1931.

Madras Estates Land Act, Ss. 135, 137, 142, *Sch. B, Art.* 21—*Amended Act IV of* 1909—*Tenants applying to District Collector for directions to landholder regarding repairs to agricultural tank—Order of District Collector in favour of tenants—Appeal by landholder against order of District Collector to District Court—Dismissal—Jurisdiction.*

Where tenants filed a petition before the District Collector to direct their landlord under S. 137 of the Estates Land Act to make repairs of an agricultural tank and the District Collector so directed, and the landlord appealed against the order to the District Court,

Held, that the District Court was justified in rejecting the appeal as there was no appeal from an order under S. 137 of the Madras Estates Land Act to the District Court, and only an appeal against that order lay to the Revenue Board under S. 142 of the Act.

Art. 21 of the Sch. B to the Act as amended by Act IV of 1909 contemplates a right in the landholder to apply for a review of the order of the District Collector under S. 137 for repairs, and only against the order passed by the District Collector in the review petition can an appeal lie to the District Court.

Opinion of Mr. V. Ramadoss on the point under S. 137 in his commentary to the Madras Estates Land Act approved.

S. Venkatesa Aiyangar for Appellant.

Y. Suryanarayana for Respondents.

K.C.

Waller and Madhavan Nair, JJ. L.P.A. No. 72 of 1926.
27th March, 1931.

Minor—Mortgage of minors' property by guardian—Joint and several decree against minors and guardian discharged—Extent of minors' liability—Individual liability of co-judgment-debtors—Absence of evidence—Presumption.

Where two divided brothers executed a promissory note and after the death of one of them a joint and several decree was obtained by the promisee against the surviving brother and the minor sons of the deceased, and thereupon the surviving brother effected a mortgage of the properties of the minors, had the deed executed in his individual capacity and as guardian of the minors and discharged the decree debt,

Held, in a suit upon the mortgage, that it was good only to the extent of the ultimate liability of the minors as between them and the guardian, and there being no evidence of such liability *inter se* the mortgage was binding on the minors to the extent of one-half of the decree debt.

3 Pat. L.J. 78 relied on.

Decision of Phillips, J., reported in 22 L.W. 466 affirmed.

N.R.C.

K. Sankara Sastri for Appellant.

V. N. Venkatavaradachari for Respondents.

B.V.V.

Ramesam, J. S.A. Nos. 1845 and 1846 of 1928.
31*st March*, 1931.

Madras Estates Land Act, S. 45—Suit for rent by Zamindar—In previous litigation by defendant his occupancy rights in land recognised, though his claim to Inam disallowed—Adverse possession—Defendant not a tenant of the zamindar in village—Whether defendant liable to pay rent.

A zamindar sued the defendant for rent due to him for lands which he claimed were belonging to him. In a previous litigation by the defendant for declaration of his lands as Inam lands, the High Court in second appeal held that they were not Inam lands but still the defendant possessed occupancy rights in them and remarked that he would be at liberty to set up a plea of adverse possession as a defence in other proceedings, if necessary. In the present suit the Lower Courts were of opinion that as the lands were originally Jeroyati lands the defendant was liable to pay rent.

Held, (1) that as the defendant was not even a tenant of the zamindar in the village, he acquired full title by adverse possession, and

(2) that the zamindar was not entitled to rent as he lost his title in the lands and S. 45 of the Estates Land Act could apply only to such cases where the trespasser of ryoti lands had not perfected his title by adverse possession.

Y. Suryanarayana for Appellant.

S. Venkatesa Aiyangar for Respondent.

K.C.

Reilly and Anantakrishna Aiyar, JJ. C.R.P. Nos. 1397 and 1613
31*st March*, 1931. of 1927.

Court Fees Act, 1870, *S.* 11—*Applicability—Administration suit—Passing of preliminary decree—Subsequent application by other creditors for proof of claims—Court-fee if payable—Nature of administration suit.*

Where in a suit for administration brought by a creditor the Court passed a preliminary decree and subsequently certain other creditors of the deceased applied to prove their claims,

Held, that those applications were not chargeable to Court-fee on the analogy of S. 11 of the Court Fees Act.

Observations to the contrary in 44 Cal. 819 not followed.

Nature of a suit for administration discussed.

Rule as to strict construction of fiscal enactments applied.

P. S. Narayanaswami Aiyar for Petitioners.

The Government Pleader (*P. Venkataramana Rao*) for the Government.

C. V. Harihara Aiyar and *T. S. Anantanarayana Aiyar* for Respondents.

B.V.V.

Madhavan Nair, J. S.A. No. 2291 of 1927.
23rd March, 1931.

Part-performance—Minor—Contract by guardian to sell—Vendee put in possession thereof—Suit by vendee for specific performance—Maintainability of.

A guardian of a minor agreed to sell the minor's property for proper purposes binding on the minor and put the vendee in possession thereof but no sale-deed was executed. The vendee paid off the debts as well. The guardian later executed another sale-deed in favour of a third person who was found not to be a purchaser for value without notice of the prior contract to sell. In a suit for specific performance by the first vendee,

Held, that the contract to sell was not specifically enforceable and part-performance did not improve the position in that respect.

N. Rama Rao for Appellant.

S. Varadachariar and *V. Pattabhirama Sastri* for Respondent.

S.V.V.

Krishnan Pandalai, J. C.R.P. Nos. 1364 and 1365 of 1929.
24th March, 1931.

Madras Estates Land Act, 1908, *Ss.* 189 *and* 213—*Suit to recover money unlawfully collected as rent with interest—Maintainability in Civil Court—Contract Act,* 1872, *S. 72—Suit falling under, whether one for damages—Rent sale—Setting aside by tenant—Suit to recover amount paid in excess of rent due—Forum.*

A suit for the refund of money unlawfully collected as rent by the abuse of the process provided for by the Madras Estates Land Act, 1908, whether described as an action for money had and received or to enforce the obligation created by S. 72 of the Contract Act, is still one for damages within the meaning of S. 213 of the Madras Estates Land Act and is not maintainable in the Civil Court.

39 M. 219 referred to.

A claim for interest by way of damages on the amount illegally recovered by the landlord, though it is in respect of the unlawful detention of the money, is still a claim for damages arising out of the abuse of the process of the Court and attracts the prohibition of Ss. 189 and 213 of the Act.

A suit brought by a tenant to recover the amount paid into Court over and above the lawful rent in order to have a rent-sale set aside is maintainable only in the Revenue Court.

T. R. Venkatarama Sastri and *T. B. Balagopal* for Petitioners.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Respondents.

B.V.V.

N.R.C.

The Chief Justice and Sundaram Chetty, J. 26*th March*, 1931.

Cr. M.P. No. 175 of 1931.

Criminal Procedure Code (*V of* 1898), *S.* 493—*Minor in custody of Court guardian—Application by mother for appointment as guardian refused—Application for* Habeas Corpus—*Sustainability—Removal of guardian as sole remedy—Guardian and Wards Act,* 1890, *Ss.* 25 *and* 39.

The illegitimate mother of a male child applied to the Chittoor District Court to be appointed guardian of the child, then in the custody of the putative father. The application was dismissed by the Lower Court and confirmed by the High Court on appeal on the ground that she was not resident in British Indian territory. The father, however, had expressed his willingness to be appointed guardian and he was so appointed by an order of the Lower Court. The mother thereupon filed an application in the High Court for a writ of *habeas corpus.*

Held, that the application was misconceived in view of the fact that the father had been appointed guardian by Court.

Held further, that a petition under S. 25 of the Guardian and Wards Act for the custody of the child was not maintainable because the child was in the lawful keeping of the guardian. The only course open to the mother under the circumstances was to apply under S. 39 of the Act for removal of the guardian.

K. Rajah Aiyar, V. Ramaswami Aiyar and *S. Narasinga Rao* for Petitioner.

S. Varadachariar, R. Rajagopala Aiyangar and *S. V. Venugopalachariar* for Respondent.

B.V.V.

Wallace and Stone, JJ. 2*nd April,* 1931.

Appeal No. 342 of 1925.

Evidence Act, S. 112—*Legitimacy —Presumption of—Rebuttal —Non-access—Proof of—Evidence of wife—Relevant, how far.*

Where a husband and wife were living apart for several years before the birth of the child and the wife was leading an unchaste life and she herself made several statements that the child was born to another person,

Held, that, there was sufficient proof of non-access as it was not necessary, in fact it was not possible, for a party to prove a negative by a positive evidence.

It is plain that S. 112 of the Evidence Act lays a heavy burden of proving or showing non-access, but such proof is not different from any other species of proof under the Evidence Act, namely, when after considering the matters before it, the Court either believes that there was non-access or considers its existence so

probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists (*see* S. 3 of the Evidence Act).

There is nothing contrary to law in the mother herself giving evidence on a point of this kind since it is not the law in this country that a wife is not a competent witness as to access or non-access by her husband.

25 M.L.J. 594 and 18 B. 468 followed.

K. V. Krishnaswami Aiyar and *R. Ramasubba Aiyar* for Appellants.

K. Rajah Aiyar and *S. Venkatesa Aiyangar* for Respondent.

K.C.

Jackson, J. C.R.P. No. 1636 of 1930.
8th April, 1931.

Civil Procedure Code (*V of* 1908), *O.* 6, *R.* 17—*Amendment—New case by amendment—If permissible.*

Where a suit was filed for possession alleging a partition between the plaintiff and the defendants about 31 years ago and a lease to the defendants of the suit properties as having fallen to the plaintiff's share, the defence was a denial of partition and a claim to the properties in their own right. The plaintiff thereupon sought to amend the plaint by including a prayer for amendment.

Held, an amendment cannot be allowed when it displaces the original case in the plaint and sets up a new case. A suit for ejectment cannot be converted into a suit for partition.

37 Mad. 529 followed.

K. Kuppuswami for Petitioner.

K. Umamaheswaran for Respondent.

S.V.V.

Sundaram Chetty, J. C.R.P. No. 109 of 1931.
8th April, 1931.

Court Fees Act (*VII of* 1870), *Sch. I, Art.* 1—*Set-off—Equitable set-off—Court-fee payable—Suit on promissory note—Defendant's claim for damages—Nature of set-off—Civil Procedure Code,* 1908, *O.* 8, *R.* 6.

The defendant had executed a promissory note to the plaintiff's assignor for the value of a motor-car he had purchased from the latter. In a suit on the promissory note the defendant pleaded that a certain amount was due to him by way of damages in respect of the breach of certain covenants in the sale. A question having been raised as to the Court-fee payable on the defendant's claim,

Held, that the defendant's claim can be said to be a legal set-off within the meaning of O. 8, R. 6, Civil Procedure Code.

Held further, that even if it should be treated as an equitable set-off, the defendant was bound to pay Court-fee on the value of his claim under Art. 1 of Sch. I of the Court Fees Act because there is nothing to show that set-off in that Article is confined to legal set-off as defined in O. 8, R. 6 of the Code.

17 M. L. J. 481 and I.L.R. 38 Bom. 631 distinguished as cases decided prior to the amendment of Art. 1 by the Civil Procedure Code, 1908.

V. Balasundaram Aiyar for Petitioner.

A. V. Viswanatha Sastri for Respondent.

B.V.V.

Ramesam, J. — S. A. No. 388 of 1928.
9th April, 1931.

Mortgage—Covenant—Possession in lieu of interest—Steps not taken to get possession—Claim for damages in the shape of mesne profits—Limitation.

Where under a covenant in a mortgage bond the mortgagee should enjoy the property in lieu of interest but he did not take steps to get delivery of possession from the mortgagor and claimed damages in the shape of mesne profits for three years and where the lower courts found the document supported by consideration to the extent of three-fourths of the entire amount of the bond but dismissed the suit on the ground that the claim for possession was barred and hence mesne profits were also barred,

Held (*i*) that it was unjustified to say that if a mortgagor failed to deliver possession to the mortgagee in breach of the covenant in the document, the mortgagee would lose his right to interest merely because the mortgagee had not taken any immediate steps to enforce possession.

17 Mad. 469; 46 Cal. 448 and S.A. No. 1199 of 1927 followed.

17 Bom. 425 and 45 Bom. 523 dissented from.

A claim for damages remains unbarred so long as the claim for the principal is also unbarred.

19 All. 39 (P.C.) and 20 Mad. 371 applied.

(*ii*) that the plaintiff was not entitled to get larger or very exorbitant rate of interest under the guise of a claim for mesne profits especially as he did not even care to have the rate mentioned in the mortgage bond (as in the case of 46 Cal. 448).

C. S. Venkatachariar and *Salem Ramaswami Aiyar* for Appellant.

C. A. Seshagiri Sastri for Respondent.

K.C.

Ramesam and Stone, JJ. O.S.A. No. 95 of 1929, etc.
1*st April*, 1931.

Partition—Construction of partition award—Reunion if restores joint family status or only introduces a rule of preferential succession—Deceased partner's lien over partnership property—Nature of—If extends over specific items of partnership property—Minor—Admission to benefits of partnership—Meaning of.

At the instance of three of five brothers, it was referred to arbitrators to divide the family property between the brothers and the arbitrator passed an award allotting to each brother a one-fifth share. In so dividing, properties were allotted to two of the brothers in undivided shares and a yarn business which was the important asset of the family was similarly allotted to the said two at a valuation. The business was continued by them under the old name and style.

Held, where a document is unambiguous, no evidence of subsequent conduct can be let in to prove the intention of the parties to the partition deed but where it is ambiguous and capable of two constructions, such evidence can be let in to find out the sense in which the parties used the words. But where as here the document showed that the two brothers had an idea of joining together, the subsequent conduct is evidence to find that they so joined and continued as a joint family. The rule excluding evidence of conduct cannot be applied with rigour to the construction of an award which is not a deed of parties or against third parties (creditors). There can be a partial partition of person and property and the family remains joint *quoad* the property not divided.

Reunion restores the joint family status and does not merely introduce a rule of preferential succession.

Where a surviving partner uses the partnership assets in trade and alienates them, the representative of the deceased partner has no lien on the specific items of partnership property for the share of the assets due to him. His claim is only to have it paid out of the surplus assets of the partnership after ascertainment. The surviving partner is the legal owner of the properties and can convey a good title to purchasers from him, unless possibly where the transferee has notice that the deceased partner's claims have not been satisfied.

Where the representative of the deceased partner is a minor and the surviving partner admitted him to the benefits of the partnership business continued by him and used the share of the deceased partner in the firm as the minor's share of the partnership capital, the minor is liable under S. 247, Contract Act, to the extent of that share in the business.

55 M.L.J. 132 and 57 M.L.J. 404 reversed.

N.R.C.

Sir C. P. Ramaswami Aiyar, C. Krishnaswami, Advocate-General, M. Subbaroya Aiyar, P. Kameswara Rao, S. Srinivasa Aiyangar, T. L. Venkatarama Aiyar, O. T. Govindan Nambiar and *R. N. Aiyangar* for Appellants.

S. Varadachariar, S. Duraiswami Aiyar and *V. Balaraman* for Respondents.

S.V.V.

Curgenven and Cornish, JJ. Appeal No. 329 of 1925.
16th April, 1931.

Provincial Insolvency Act (III of 1907), *S.* 34—*Execution sale completed after the filing of insolvency petition but before adjudication—Right of the Official Receiver to the property sold—Order of annulment under S.* 37 *as fraudulent preference—Effect of—Mortgage suit—Interest from date of suit to date fixed for payment—If discretionary—Rate of—Proposed sale by Official Receiver of certain property as the insolvent's property objection to by a claimant—No enquiry but property sold at the sole risk of the purchaser—Whether order conclusive against claimant.*

An execution sale of the property of an insolvent completed after the presentation of an insolvency petition but before the order of adjudication has been passed, is protected under the provisions of S. 34 (1) of the Provincial Insolvency Act (III of 1907) and the property so sold does not vest in the Official Receiver on adjudication.

42 All. 336 followed.

Though the annulment of a transfer under S. 37 as a fraudulent preference is conclusive of the property having vested in the Official Receiver, still the annulment will not have the effect of depriving any other person of a title which is protected by the Act.

(1899) 1 Q.B. 622 referred to.

In mortgage suits, the mortgagee is entitled as of right to interest at the contract rate till the date fixed for payment.

A.I.R. 1927 P.C. 1 and 34 C. 150 followed.

Where a claimant objects to the proposed sale of certain property by the Official Receiver and the Insolvency Court, without enquiring into the alleged title of the claimant, merely directs the sale of the right, title and interest of the insolvent at the sole risk of the purchaser, there is no order which can be said to be binding and conclusive as against the claimant.

K. Rajah Aiyar and *K. S. Rajagopalachari* for Appellant.

R. Rajagopala Aiyangar for Respondent.

S.V.V.

Jackson, J. C.R.P. No. 1281 of 1930.
9th April, 1931.

Court Fees Act (VII of 1870), *S.* 17—*Deposit of sums of money on different dates—Suit to recover several deposits—Issue of single notice of demand—Effect—Court-fee payable as on "distinct subjects".*

Where different sums of money were deposited by the plaintiff in the defendant's firm on three different dates the rate of interest being the same, and a single notice of demand having been made for the repayment of the deposit, the suit was framed as one for an account of the several deposits,

Held, that Court-fee was payable on the several sums as on distinct subjects and not on their aggregate value; each deposit is a distinct subject within the meaning of Section 17 of the Court Fees Act because different suits could have been brought on each of the deposits, O 2, R. 2, Civil Procedure Code, not being a bar to such a course. In such a case, demand is not necessary to give a cause of action for the recovery of the amount and therefore the fact that a single notice was given is immaterial.

9 All. 452 followed.

46 Bom. 142 referred to.

A.I.R. 1924 Patna 596 distinguished as being a case where demand was necessary to give a cause of action.

K. S. Krishnaswami Aiyangar and *S. Ramaswami Aiyangar* for Petitioner.

S. Varadachariar and *S. V. Venugopalachariar* for Respondent.

B.V.V.

The Chief Justice, Sundaram Chetty and Stone, JJ. O.P. No. 63 of 1930.
16th April, 1931.

Income-tax Act (XI of 1922), *Ss.* 48 *to* 50 *and* 66 (1)—*Review proceedings before Commissioner of Income-tax—Application to have case stated—Refusal—Application for mandamus—Sustainability—Right to refund—Specific Relief Act,* 1877, *S.* 45.

Where in proceedings started by the Commissioner of Income-tax the order of the Assistant Commissioner which was in favour of the assessee was set aside and the assessee's application to the Commissioner for stating a case to the High Court was refused,

Held, that the High Court had jurisdiction to entertain an application by the assessee under S. 45 of the Specific Relief Act for a mandamus directing the Commissioner of Income-tax to state a case.

49 Mad. 725 (F.B.) relied on.

N.R.C.

Held, further, that an assessee is not entitled to claim a refund apart from the provisions of Ss. 48 to 50 of the Income-tax Act.

V. Rajagopala Aiyar and *T. V. Ramiah* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

B.V.V.

The Chief Justice, Sundaram Chetty and Stone, JJ.
16th April, 1931.

O.P. No. 160 of 1930.

Income-tax Act (*XI of* 1922), *Ss.* 13 *and* 66—*Money-lending business—Payments by debtor—Appropriation towards principal or interest—Order of Income-tax Officer regarding same—Reference—Question of law.*

An assessee carrying on a money-lending business received a sum of money in the year of account from his debtor and instead of appropriating the same either towards the principal or for interest kept it in suspense account and contended that the appropriation should be made only when the accounts were finally adjusted. Though the amount paid exceeded the interest that had become payable the Income-tax authorities proceeded with the assessment on the footing that the payment should be appropriated towards interest.

Held, that the Income-tax authorities had in such a case merely exercised a discretion vested in them under S. 13 of the Income-tax Act and that no question of law arose for decision.

V. Rajagopala Aiyar and *T. V. Ramiah* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

B.V.V.

Jackson, J.
16th April, 1931.

Cr.R.C. No. 809 of 1930.

Criminal Procedure Code (*V of* 1898), *S.* 144 (4)—Ex parte *order passed by Magistrate—Petition to rescind—Dismissal—Order not containing reasons—Validity.*

An order dismissing a petition under S. 144 (4), Criminal Procedure Code, to rescind or modify an order passed *ex parte* by the Magistrate, is illegal if it does not contain reasons for the dismissal.

T. V. Ramiah for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

The Public Prosecutor (*L. H. Bewes*) for the Crown.

B.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. No. 304 of 1927.
20th April, 1931.

Will—Application for probate—Onus probandi—*Nature of evidence to be given.*

In applications for probate the *onus probandi* is always on the person who propounds a will and it is discharged only by proof that the document which is the subject-matter of the proceeding is the last will of a competent testator.

Per Reilly, J.—The rule stated in *Ram Gopal Lal* v. *Aipna Kunwar,* (1922) I.L.R. 44 All. 495 (P.C.), does not mean that the plaintiff should prove that there must be no suspicion but only that he must give thoroughly good evidence to prove that it is the last will of a competent testator.

Per Anantakrishna Aiyar, J.—Courts of first instance ought not to deal with contested probate proceedings as ordinary cases having regard to the high probative value attached to the decisions thereon. They should take special care to see that direct evidence of material witnesses are produced in such cases.

T R. Ramachandra Aiyar and *V. Raghavachariar* for Appellant.

The Advocate-General (*A. Krishnaswami Aiyar*) and *T. E. Ramabhadrachariar* for Respondent.

B.V.V.

Venkatasubba Rao, J. S.A. No. 368 of 1928.
21st April, 1931.

Evidence Act, S. 112—*Access—Meaning of—Whether opportunity of access enough—Judicial separation—If recognised in Hindu Law—Effect of living separate.*

A husband and wife separated and were living separately from 1881 in two neighbouring villages. Children were born to the wife in 1891 and 1898. The husband soon after married a second wife and some years later a third wife. The first wife was discarded on suspicion of immorality. The Subordinate Judge had found that there was no sexual intercourse between the husband and the wife at all material times but there were opportunities for access.

Held, "access" in S. 112 means "sexual intercourse" and not mere opportunity of access to the woman. Judicial separation is not recognised in Hindu Law. The English cases like 12 Probate 112 laying down that the presumption of legitimacy is rebutted after judicial separation go too far under the Indian Law where under S. 112 non-access has got to be proved as a fact. There is yet a presumption of legitimacy but that presumption will be very slight when it is proved that the spouses had separated.

Morris v. *Davies,* 5 Cl. and F. 163, followed.

Case-law discussed.

T. M. Krishnaswami Aiyar and *B. C. Seshachala Aiyar* for Appellants.

S. Varadachariar, A. S. Sivakaminathan and *C. Gopalan* for Respondents.

S.V.V.

Anantakrishna Aiyar, J. C.R.P. Nos. 1774 and 1775 of 1930.
24th April, 1931.

Civil Procedure Code, S. 49 *and O.* 21, *Rr.* 16 *and* 18—*Assignment subject to equities—Notice of equities if necessary—Cross decrees—Execution of—Set off when claimable—Failure to plead the right to set off in a prior execution petition—If a bar to a plea in a later execution petition—Both decrees not in the same Court on the date of the prior execution petition.*

A and *B* obtained cross decrees in the same Court in two separate suits. *B* got his decree transmitted to another Court for execution. *A* applied for execution of his decree at that stage in the Court which passed the decree but did not ask for a set off. *B* then assigned his decree and the assignee applied to the Court which passed the decree to recognise the assignment. *A* then put in another execution petition claiming set off of *B's* decree against his. *A's* was the larger decree. The assignee contended (*i*) that the set off cannot be allowed to be pleaded as it was not pleaded in the prior execution petition, and (*ii*) that he was an assignee without notice of the cross decree and therefore it was not subject to equities and cannot be enforced under O. 21, R. 18.

Held, (*i*) that no set off can be allowed unless both the decrees are pending for execution in the same Court.

32 Mad. 336 followed.

A.I.R. 1930 Lah. 508 distinguished.

(*ii*) an assignee of a decree even without notice of the existence of the cross decree against his assignor is subject to the equities available to the holder of the cross decree.

2 C.L.J. 312 followed.

(*iii*) the failure to raise the plea in the prior execution petition was not a bar to raising it in the next, as then the cross decree was not in this Court but transmitted to another Court.

D. Ramaswami Aiyangar for Petitioner.

K. Saminathan for *A. V. Visvanatha Sastri* for Respondent.

S.V.V.

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